

Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?

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In response to the terrorist attacks in New York and Washington D.C. on September 11, 2001 the United States has waged a global war on terrorism. Since September 11, 2001, the United States Federal Government has built up an arsenal of executive and legislative weapons to fight this war on terrorism. As part of that arsenal, President George W. Bush issued a Military Order on November 13, 2001 that established military commissions to try suspected terrorists. Some critics have denounced the Order as an unconstitutional deprivation of civil liberties that far exceeds President Bush's power as Commander-in-Chief. Others have argued that in times of war the government may constitutionally deprive civil liberties in order to protect the country, and that President Bush acted within his war powers when issuing the Order.

This note seeks to answer two basic questions. First, are President Bush's Military Order and the rules promulgated under that Order constitutional even if they deprive civil liberties? Second, even if the Order and its rules are constitutional, will President Bush's military commissions help win the war against terrorism? President Bush's military tribunals are likely constitutional in light of the Supreme Court's decisions regarding both the military commissions established by President Lincoln during the Civil War and President Roosevelt during World War II. As written, however, both the November 13 Order and the Department of Defense rules promulgated under it violate international law, namely the Geneva Conventions. This note suggests that President Bush's military commissions will hinder, rather than facilitate, the war on terrorism until the Bush Administration amends the Order and the rules promulgated under it to adhere to international law.

* B.A., University of Notre Dame, 2000. J.D., The Ohio State University Moritz College of Law, 2003 (expected). This note is dedicated to the victims of September 11, their families, and the men and women in the United States government and military who work every day to protect our government and defend our freedoms. Thanks to Professor Mary Ellen O'Connell and Dean Gregory M. Travalio for all their suggestions as I researched and wrote this note. Thanks also to Tara Ferrell, the managing editor of this note, and Jason Green, the Journal's executive editor, for all the hours they sacrificed to get this note ready for publication. A special thanks to my parents for sacrificing so much to give me an education, for always telling me how proud they were of me and how much they loved me, and for teaching me that I should "work to live, not live to work." And finally to my fiancé, Lám, for teaching me the value of freedom and the beauty of a life truly lived and loved.

I. INTRODUCTION

In the wake of the terrorist attacks in New York and Washington D.C. on September 11, 2001, the United States has waged a war on terrorism.¹ President George W. Bush has promised that “[w]e will defend our country and while we do so, we will not sacrifice the freedoms that make our land unique.”² Within months of the attacks, however, critics—including law professors, attorneys, members of Congress, and defenders of civil liberty—had already begun to argue that President Bush was not keeping his promise.³ The main focus of criticism has been President Bush’s November 13 Military Order (November 13 Order),⁴

¹ Elisabeth Bumiller & Katharine Q. Seelye, *Bush Defends Wartime Call for Tribunals*, N.Y. TIMES, Dec. 5, 2001, at A1; William Glaberson, *Support for Bush’s Antiterror Plan*, N.Y. TIMES, Dec. 5, 2001, at B6.

Under international law, the laws of war apply equally to declared wars and to armed conflicts. Comm. on Military Affairs & Justice of the Ass’n of the B. of the City of N.Y., *Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws Be Silent?*, 57 REC. ASS’N B. CITY N.Y. 39 (2002), www.abcny.org/pdf/should%20the%20Laws%20be%20Silent%204.pdf, at *11. [hereinafter Committee on Military Affairs]; see also *infra* notes 141–45 and accompanying text. Congress authorized President Bush to use whatever military force he deemed necessary to bring to justice the terrorists connected to the attacks of September 11. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001) [hereinafter Joint Resolution]. President Bush acted on that authorization and initiated armed conflict in Afghanistan shortly thereafter. Committee on Military Affairs, *supra*, at 3–4.

The United States has determined that the eighteen foreign nationals who carried out the September 11 terrorist attacks against the World Trade Center and the Pentagon were members of the international terrorist organization al Qaeda, led by Osama bin Laden and based primarily in Afghanistan. *Id.* The United States Government accused al Qaeda of training, financing, and controlling the September 11 attacks. *Id.*

² President George W. Bush, Remarks at Swearing-In Ceremony of Former Pennsylvania Governor Tom Ridge as director of the Office of Homeland Security (Oct. 8, 2001).

³ See William Safire, *Kangaroo Courts*, N.Y. TIMES, Nov. 26, 2001, at A17; Evan Thomas & Michael Isikoff, *Between Liberty and Security*, NEWSWEEK, Dec. 10, 2001, at 36; see, e.g., Anthony Lewis, *Wake Up, America*, N.Y. TIMES, Nov. 30, 2001, at A27 (noting the dangerous breadth of the November 13 Order, *infra* note 4, the lack of sunset provision, and the dangerous precedent of tyranny).

⁴ Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter November 13 Order]. A military order invokes the president’s power as commander-in-chief, while an executive order evokes a president’s power as the chief executive officer of the United States. Committee on Military Affairs, *supra* note 1, at 6 n.18. Of course, there are also law professors, attorneys, congresspersons, and members of the general public who support President Bush’s November 13 Order as just. See, e.g., Professor Barry Latzer, Letter to the Editor, *If bin Laden Is Brought to Trial*, N.Y. TIMES, Nov. 24, 2001, at A26; DOJ Oversight: *Preserving Our Freedoms While Defending Against Terrorism: Before the S. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Senator Orrin Hatch, Ranking Republican

which asserts President Bush's authority⁵ to establish military commissions⁶ to try suspected terrorists.⁷

Some critics have declared the proclamation an unconstitutional deprivation of fundamental liberties that far exceeds the executive's power as Commander-in-Chief.⁸ Other critics have suggested that although the proclamation may be

Member, S. Comm. on the Judiciary) (Dec. 6, 2001), http://judiciary.senate.gov/print_member_statement.cfm?id=121&wit_id=51 (last visited Oct. 21, 2002).

⁵ No actual military commissions have been established under the November 13 Order. The closest that the Bush Administration has come to establishing an actual commission since November 13 was in late November when the Administration debated whether to try Zacarias Moussaoui, a French citizen of Moroccan descent, under a military commission or in federal court. Don Van Natta Jr., *Debate Centers on Which Court Will Decide Fate of Arab Man*, N.Y. TIMES, Nov. 22, 2001, at B6. Moussaoui was arrested on immigration charges after he sought lessons from a flight school on how to fly, but not land, jets. *Id.* The Administration chose, however, to try Moussaoui in federal district court. Don Van Natta Jr., *Compromise Settles Debate Over Tribunal*, N.Y. TIMES, Dec. 12, 2001, at B1.

⁶ The phrase "military commission" usually refers to a common law war court set up during periods of hostilities, martial rule, or military government as a tool for the more efficient execution of the war powers vested in Congress and the President. See Lt. Col. Thomas C. Marmoa et al., *Military Commissions 3* (April 1953) (unpublished manual, on file with The Judge Advocate General's School, Charlottesville, Va.); CHARLES FAIRMAN, *THE LAW OF MARTIAL RULE* 262 (2d ed. 1943). Military commissions are special courts in that they provide for the exercise of extraordinary war powers. Marmoa et al., *supra*, at 14 n.33.

The phrase "military tribunal," on the other hand, refers to all courts of military justice, including courts-martial and military commissions. Marmoa et al., *supra*, at 13. Military tribunals can basically try three types of cases. First, military tribunals can try members of the military for violation of the military code. *Id.* at 14. Generally, this first type of case is tried in courts-martial. *Id.* Second, military tribunals can try civilians for civil crimes when civil courts are closed. *Id.* Third, military tribunals can try civilians and members of the military who have violated the laws of war. *Id.* The second and third types of cases are usually tried in military commissions. *Id.*

Under the United States Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-946 (2000), general courts-martial have jurisdiction to try all three types of cases cognizable by military tribunals. 10 U.S.C. § 818 (2000). The UCMJ also provides that § 818's granting of jurisdiction to courts-martial does not deprive military commissions of concurrent jurisdiction for offenses or offenders that military commissions may try under the laws of war or the authority of a statute. 10 U.S.C. § 821 (2000).

⁷ See, e.g., *supra* note 3. The November 13 Order would apply to all non-citizens determined by the President to fit into at least one of three groups: (1) members of the international organization known as al Qaeda; (2) to have engaged in, aided, abetted, or conspired to commit either acts of international terrorism or acts in preparation for acts of international terrorism that have caused, threaten to cause, or aim to cause injury or adverse affects on the United States, its citizens, national security, foreign policy, or economy; or (3) those who have intentionally harbored persons covered under (1) and (2). November 13 Order, *supra* note 4, § 2, at 57,834.

⁸ For example, Laurence Tribe, professor of constitutional law at Harvard Law School and witness before the Senate Judiciary Committee on the constitutionality of the November 13

constitutional, it is nevertheless unwise to infringe on the Constitution during this war against terrorism—a war meant to avenge the very same liberties that the November 13 Order seems to infringe.⁹ This note, inspired by the countless editorials, articles, interviews, Internet discussions, and law school classroom conversations about the November 13 Order, seeks to evaluate the constitutionality and the wisdom of President Bush's proposed military commissions. Parts II and III review the context and make-up of the military commissions that President Lincoln established during the Civil War and that President Roosevelt established during World War II. The evaluation in Part IV compares Bush's war commission with those historic commissions. The note then concludes in Part V with a look to one aspect of international law, the Geneva Conventions, to answer the question: What efficacy will President Bush's war commission have on the global war against terrorism?¹⁰

II. CIVIL WAR MILITARY COMMISSIONS AND SUSPENSION OF HABEAS CORPUS

A. Lincoln Establishes Martial Law and Suspends Habeas Corpus

On April 27, 1861, President Lincoln simultaneously declared martial law and authorized Commanding General Winfield Scott to suspend the writ of habeas corpus¹¹ in Union territories where civilian war protesters were

Order, stated, "I denounced [the] order as unconstitutional. The power that it asserts is too quintessentially legislative to stand without authorization from Congress, which the laws cited by the [A]ttorney [G]eneral fail to provide." Laurence H. Tribe, Letter to the Editor, *Military Tribunals: Too Broad a Power*, N.Y. TIMES, Dec. 7, 2001, at A30; see also *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Before the S. Comm. on the Judiciary*, 107th Cong. (statement of Laurence H. Tribe, Professor of Law, Harvard Law School) (Dec. 4, 2001), http://www.senate.gov/~judiciary/testimony.cfm?id=129&wit_id=73 (last visited Oct. 12, 2002); *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Before the S. Comm. on the Judiciary*, 107th Cong. (statement of Kate Martin, Director of the Center for National Security Studies) (Nov. 28, 2001), http://www.senate.gov/~judiciary/testimony.cfm?id=126&wit_id=71 (last visited Oct. 21, 2002).

⁹ See, e.g., William Glaberson, *Use of Military Court Divides Legal Experts*, N.Y. TIMES, Nov. 14, 2001, at B8.

¹⁰ The international legal principles governing the legality of the military commissions are not limited to the Geneva Conventions. Unfortunately, a survey of international law regarding military commissions is beyond the scope of this paper.

¹¹ PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISION MAKING: CASES AND MATERIALS* 222 (4th ed. 2000). Lincoln's proclamation of April 27, 1861, addressed to Winfield Scott, Commanding General of United States Army:

You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the military line which is now used between the city of

compromising the war effort by encouraging defectors and recruiting for the confederate army.¹² Lincoln proclaimed that all persons who discouraged enlistments or engaged in disloyal practices would be subject to trial in a military commission, regardless of whether they were civilians or military.¹³ Lincoln thought military commissions¹⁴ were necessary because, according to him, state courts did not have the authority to convict war protesters.¹⁵ By suspending the privilege of habeas corpus, Lincoln denied persons tried under military commissions the right to remove their cases to civil courts, including the Supreme Court.¹⁶

Writing for the Court, Justice Taney ruled in *Ex parte Merryman*¹⁷ that the President's suspension of habeas corpus was unconstitutional on two grounds: (1)

Philadelphia via Perryville, Annapolis City and Annapolis Junction [Maryland] you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally or through the officer in command at the point where resistance occurs are authorized to suspend that writ.

Letter from Abraham Lincoln, President of the United States, to Winfield Scott, Commanding General of the United States Army (April 27, 1861), <http://www.civilwarhome.com/Writ.htm> (last visited Oct. 21, 2002). That same day General Scott forwarded the President's communication to the area generals. BREST ET AL., *supra*, at 222.

¹² BREST ET AL., *supra* note 11, at 222.

¹³ *Id.* The Union used military commissions to try approximately 2,000 cases during the Civil War. Marmoa et al., *supra* note 6, at 6.

¹⁴ The Civil War was the first time in American history that the term "military commissions" was widely used to designate American common law war courts. Marmoa et al., *supra* note 6, at 5-6.

¹⁵ See BREST ET AL., *supra* note 11, at 222.

¹⁶ *Id.* Generally, "Habeas Corpus" is a "writ employed to bring a person before a court." BLACK'S LAW DICTIONARY 284 (Pocket ed. 1996). There are several forms of the writ of habeas corpus. *Id.* The writ may be used in civil cases to remove the case from an inferior court to a superior court, or to remove a person from one court's custody to another court's custody. *Id.* (respectively, "habeas corpus ad faciendum et recipiendum" and "habeas corpus ad respondendum"). The writ may also be used in criminal cases to bring a prisoner before the court on charges other than those for which the prisoner is confined. *Id.* (referring to "habeas corpus ad prosequendum"). The writ may be used in civil or criminal cases to bring a prisoner to a court to testify. *Id.* (referring to "habeas corpus ad testificandum"). The most frequent reason the writ is employed, and the most important form of the writ for this note, is to direct a person or institution that is detaining a person to bring that person before a court in order to ensure that the party's imprisonment is not illegal. *Id.* (referring to "habeas corpus ad subjiciendum").

¹⁷ *Ex parte Merryman*, 17 F. Cas. 144 (D. Md. 1861) (No. 9487). Maryland Secessionist John Merryman was among the thousands arrested by military troops under Lincoln's declaration. *Id.* at 144-45. Military troops arrested Merryman on May 25, 1861, for destroying railroad bridges after an antiwar riot in Baltimore. *Id.* Merryman's lawyer filed a writ of habeas corpus addressed to General George Cadwalader, commander of Fort McHenry where Merryman was being held. *Id.* at 145. Honorable Roger B. Taney, then Chief Justice of the

only Congress has the right to suspend the privilege of habeas corpus; and (2) the President exceeded his war powers.¹⁸ First, Justice Taney rejected the proposition that in times of war the President must have the authority to do whatever is necessary to protect the country.¹⁹ He asserted that because “[t]he government of the United States is one of delegated and limited power,” the branches of the government could not exercise power beyond those expressly granted under the Constitution, even in times of war.²⁰ The Constitution does not expressly state who has the authority to suspend habeas corpus when public safety so requires.²¹ Taney asserted, however, that because the constitutional provision authorizing suspension of habeas corpus is located in Article I, the article devoted to the legislative department, only an Act of Congress could authorize the suspension.²²

Second, Justice Taney stated that unless a person was under the military’s judicial authority and subject to military control, a military officer had no right to arrest and detain a person not subject to the rules and articles of war for an offense against the laws of the United States.²³ If a military officer arrested a party not subject to the military’s judicial authority, Taney asserted, the officer had the duty to deliver that person to the civil authority immediately.²⁴ Taney found that

Supreme Court of the United States, issued the writ of habeas corpus commanding the military to bring Merryman before the circuit court in Baltimore where Justice Taney was serving at the time. BREST ET AL., *supra* note 11, at 223. General Cadwalader refused to release Merryman or to attend the May 27 hearing before Taney. *Id.* General Cadwalader also refused to comply with a second order from Taney to be present the following day, May 28. *Id.* General Cadwalader justified detaining Merryman on the basis of President Lincoln’s suspension of habeas corpus. DONALD P. KOMMERS & JOHN E. FINN, AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES 291 (1988).

¹⁸ *Id.* at 291.

¹⁹ *Id.* The Justice specifically stated, “[n]or can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defense in times of tumult and danger.” BREST ET AL., *supra* note 11, at 225.

²⁰ KOMMERS & FINN, *supra* note 17, at 291.

²¹ BREST ET AL., *supra* note 11, at 223. Article I, section 9, clause 2 of the U.S. Constitution states in full: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2. Although the “Privilege of Habeas Corpus” is a constitutionally required due process protection, the fact that it is a “Privilege” rather than a “right” indicates that the privilege may be revoked. Committee on Military Affairs, *supra* note 1, at 2. The Constitution states that the privilege may only be suspended in time of crisis, i.e., “Rebellion or Invasion,” when the public safety requires. U.S. CONST. art. I, § 9, cl. 2. The Framers wrote the clause in a passive form—“shall not be suspended”—rather than active. *Id.* The Constitution does not expressly state, however, what person or branch of the government has the authority to decide that public safety requires a suspension of the privilege.

²² BREST ET AL., *supra* note 11, at 222–23.

²³ *Id.* at 223.

²⁴ *Id.*

because Merryman was a civilian from Indiana, a state not at war with the United States, and because the civilian courts in Indiana were open, the military did not have judicial authority over Merryman.²⁵ Although Lincoln released Merryman, he ignored Justice Taney's clear position and continued to suspend the writ of habeas corpus and to try civilians in military courts.²⁶

B. Lincoln Defends His Actions to Congress and Congress Responds

During a special address to Congress on July 4, 1861, President Lincoln acknowledged that as executive he did not generally have the authority to suspend habeas corpus.²⁷ Lincoln in fact expressly requested that Congress sanction his actions.²⁸ Lincoln nevertheless defended his establishment of military courts and his suspending habeas corpus.²⁹ He claimed that because Congress had not been in session when the need to suspend habeas corpus arose, as President and Commander-in-Chief he was forced to act on his own to protect the nation:

[T]he Constitution itself, [sic] is silent as to which, or who, is to exercise the power [to suspend habeas corpus]; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together . . .³⁰

²⁵ *Id.* at 225.

²⁶ KOMMERS & FINN, *supra* note 17, at 291; *see also* BREST ET AL., *supra* note 11, at 224. Taney wrote, "[the president] certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law." *Ex parte Merryman*, 17 F. Cas. 144, 149 (D. Md. 1861) (No. 9487).

²⁷ LOUIS FISHER, *PRESIDENTIAL WAR POWER* 38 (1995).

²⁸ *Id.*

²⁹ *Id.*

³⁰ KOMMERS & FINN, *supra* note 17, at 291 (quoting President Lincoln). Lincoln also stated:

I [understood] my oath to preserve the [C]onstitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that [C]onstitution was the organic law. Was it possible to lose the nation, and yet preserve the [C]onstitution? I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the [C]onstitution, through the preservation of the nation.

Id. at 287.

President Lincoln was also confident that Congress would agree that he had done what was necessary, stating: "[W]hether strictly legal or not, [my actions] were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them." FISHER, *supra* note 27, at 38.

Congress apparently took to heart the President's request to ratify his actions. On August 6, 1861, Congress retroactively approved "all the acts, proclamations, and orders of the President . . . respecting the army and navy of the United States."³¹ On March 3, 1863, Congress passed the Habeas Corpus Act that provided President Lincoln the power to suspend habeas corpus whenever he determined public safety required suspension.³² President Lincoln cited the March 3 statutory authority when, on September 15, 1863, he again proclaimed that the privilege of the writ of habeas corpus was suspended.³³

C. *The Supreme Court Responds*

The Supreme Court did not address the constitutionality of Lincoln's military commissions and his suspending habeas corpus until *Ex parte Milligan*,³⁴ decided a year after the war had ended and Lincoln had died.³⁵ The Court established that, despite Congress's ratification of Lincoln's military order suspending habeas corpus, the federal courts had jurisdiction to hear a writ of habeas corpus to determine the validity of the military commission's jurisdiction.³⁶ Consequently, the Supreme Court could review whether a military commission had jurisdiction over Milligan.³⁷

³¹ BREST ET AL., *supra* note 11, at 225. Scholars assert there is uncertainty as to whether this August 6 Act included the suspension of habeas corpus, although there seems to be no doubt that it included the declaration of martial law. *Id.*

³² *Id.* at 225. The Act stated in pertinent part, "during the present rebellion the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States or any part thereof." *Id.* Although Congress did not expressly chastise Lincoln for stepping outside his constitutional authority, some scholars argue that the March 3 Act implied either that the president does not have the authority to suspend the writ of habeas corpus, or that the president only has authority when Congress is not in session and public safety requires. *Id.*

³³ *Id.*

³⁴ 71 U.S. (4 Wall.) 2 (1866). Justice Davis, writing for the majority, seemed to imply that during war time considerations of public safety require actions that would not be prudent in times of safety:

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.

Id. at 109.

³⁵ FISHER, *supra* note 27, at 40.

³⁶ 71 U.S. (4 Wall.) at 130-31.

³⁷ *Id.* at 110.

The Court also recognized that in emergency times, the government needed the ability to detain persons who posed immediate danger to the country.³⁸ Nevertheless, the Court agreed with Justice Taney's holding in *Merryman*³⁹ that national emergency and war could not sanction a military trial of a civilian if the federal civil courts were open to hear criminal accusations.⁴⁰ Additionally, although Congress gave the President, in the 1863 Act, the authority to suspend habeas corpus when public safety required, that Act also expressly stated that, as long as civil courts were open, the military was required to cede jurisdiction over civilians whom it had arrested to the civil courts.⁴¹ The Court felt that the law would only justify a military trial of a civilian if the civil courts were closed.⁴² Therefore the President, even though the country was at war, "had no right to

³⁸ *Id.* at 125.

³⁹ See *supra* notes 17–20 and accompanying text.

⁴⁰ *Milligan*, 71 U.S. (4 Wall.) at 121; KOMMERS & FINN, *supra* note 17, at 292; FISHER, *supra* note 27, at 40.

According to the *Milligan* Court, Congress's 1863 Act relating to habeas corpus did not permit the military to detain a suspected person beyond a fixed period, unless judicial proceedings commenced against him in civil courts. *Milligan*, 71 U.S. (4 Wall.) at 116. The military was to provide the judges of the courts of the United States a list of names of all persons, not prisoners of war, who were then or would be held in custody by the authority of the President, and who were citizens of states where the federal courts were open and unimpaired. *Id.* If a grand jury of the district convened and adjourned and did not indict or present one of the persons listed, that person was entitled to discharge. *Id.* If the military refused to provide the judges with a list and twenty days passed from the time of arrest to the end of the session of the grand jury, that person was equally entitled to discharge as if the list had been provided. *Id.*

Chief Justice Chase and three other members of the Court dissented because they believed that if national security so required, Congress could submit citizens to the jurisdiction of military trial even when civil courts were not closed:

[W]hen the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.

Id. at 140. The dissenters therefore felt citizens could be subject to military trials, but only under the authority of Congress, not the President acting alone. *Id.*

⁴¹ *Milligan*, 71 U.S. (4 Wall.) at 131.

⁴² *Id.* at 119. According to the Court, several Amendments to the Constitution—specifically, the Fourth (right to be secure in one's person and effects against unreasonable searches and seizures); Fifth (right to a grand jury when held for capital or otherwise infamous crime not arising in the land or naval forces when in actual service in time of war or public danger; and the right not to be deprived of life, liberty, or property without due process of law); and the Sixth (right to trial by jury)—gave citizens the rights to trial in courts where those rights are guaranteed. *Id.* at 119–20. The Court did note that "[i]f there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings." *Id.* at 119.

conclude that Milligan, if guilty, would not receive in [Circuit Court] merited punishment” The Court also contradicted Lincoln’s belief that civil courts did not have the authority to convict war protesters. The Court stated that the circuit court “constantly engaged in the trial of similar offense, and was never interrupted in its administration of criminal justice.”⁴³ Additionally, the Supreme Court noted that times of war are times when the Court is most compelled to protect constitutional civil liberties.⁴⁴

D. Important Points to Remember from the Milligan Decision

There are three elements of the *Milligan* case that are important in analyzing President Bush’s November 13 Order. First, the *Milligan* Court focused on the fact that Congress’s March 3, 1863, Habeas Corpus Act expressly stated that any civilian citizens that the military arrested were to be handed over to the civil courts, so long as the civil courts were in session.⁴⁵

Second, the Court noted that even if Congress had authorized the President to suspend habeas corpus, the federal courts would always enjoy the right to review the jurisdiction of the military commissions.⁴⁶

Third, the *Milligan* Court only addressed one of the three types of cases that a military commission may hear: a case in which a civilian committed a civil crime.⁴⁷ Note that the Court was focusing on the distinction between members of the military versus civilians, not on the distinction between citizens and aliens.

⁴³ *Id.* at 122.

⁴⁴ *Id.* at 123–24. The Court stated:

When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted [sic] with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

Id.

Congress seemed to disagree with the *Milligan* Court’s holding. Congress responded to the Court’s holding in *Milligan* by passing legislation to limit the Court’s jurisdiction to hear cases involving Lincoln’s military trials or martial law during the Civil War. FISHER, *supra* note 27, at 40 (citation omitted). Civil courts could no longer take jurisdiction over or reverse decisions on officer’s acts to implement presidential proclamations from March 4, 1861, through June 30, 1866. *Id.*

⁴⁵ See *supra* note 40.

⁴⁶ See *supra* note 36.

⁴⁷ *Milligan*, 71 U.S. (4 Wall.) at 121–22.

Even though Milligan was a citizen, the Court indicated that its decision applies not only to civilians, but also to all citizens.⁴⁸

III. WORLD WAR II: ROOSEVELT'S MILITARY COMMISSION

A. Roosevelt Creates a Military Commission to Try Nazi Saboteurs

Japan launched a devastating air-attack on Pearl Harbor, Hawaii, on December 7, 1941. That attack killed thousands of American military men and women and destroyed a large portion of the American naval fleet at a time when the world was at war.⁴⁹ Yet President Roosevelt did not establish a military commission until eight members of the Nazi military landed on American soil, changed into civilian clothes, and set out in secret to destroy American military factories in the summer of 1942.⁵⁰ On July 2, 1942, President Roosevelt issued a

⁴⁸ The Court stated that "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Milligan*, 71 U.S. (4 Wall.) at 120–21. This statement seems especially telling because the members of the 1866 Supreme Court had recently witnessed the freeing of the slaves.

⁴⁹ Kenneth Reich & David Pierson, *Survivors of Pearl Harbor Honored*, L.A. TIMES, Dec. 8, 2001, at B6. Some commentators have noted that the terrorist attacks of September 11 actually posed a much greater threat to the United States than the attack on Pearl Harbor. See, e.g., Theo Stein, *Terror Attacks Go Far Beyond Pearl Harbor, Historian Says*, DENVER POST, Sept. 23, 2001, at A30. Under such a view, it would not seem odd that President Bush called for a military commission much sooner than President Roosevelt.

⁵⁰ *Ex parte Quirin*, 317 U.S. 1, 21 (1942). The eight men had all spent significant time in the United States but returned to Germany to join the German Reich between 1933 and 1941. *Id.* at 20. The men trained at a sabotage school near Berlin in preparation for their attack on America. *Id.* at 21. The first four saboteurs landed on Long Island about June 13, 1942, loaded with explosives. *Id.* The second group of four landed at Ponte Vedra Beach, Florida about June 17, 1942, also loaded with explosives. *Id.* All eight men were arrested in late June. *Id.*

Roosevelt did not establish a military commission until six months after Congress had declared the United States at war. On December 8, 1941, the day after the Japanese bombed Pearl Harbor, Congress declared war against Japan, S.J. Res. 116, 77th Cong., Pub. L. No. 328, 55 Stat. 795 (1941). Just a few days later on December 11, 1941, Congress issued a declaration of war against Germany and Italy. S.J. Res. 119, 77th Cong., Pub. L. No. 331, 55 Stat. 796 (1941); S.J. Res. 120, 77th Cong., Pub. L. No. 332, 55 Stat. 797 (1941). President Roosevelt had in fact declared a national emergency three years before he felt the need for military commissions: he declared a national emergency in 1939, and then again in 1941. Proclamation No. 2352, 3 C.F.R. (1938–1943 Compilation) 114 (1968), *reprinted in*, 54 Stat. 2643 (1939) (limited national emergency); Proclamation No. 2487, 3 C.F.R. (1938–1943 Compilation) 234 (1968), *reprinted in*, 55 Stat. 1647 (1941) (unlimited national emergency), <http://www.yale.edu/lawweb/avalon/president/proclamations/frproc01.htm>. There is evidence, however, that President Roosevelt did not establish a military commission because he thought national security required it, or because the civilian courts could not handle the trial of the eight Nazi saboteurs, but in order to cover a Federal Bureau of Investigation error in ignoring a tip

proclamation that denied enemies access to the courts of the United States and bestowed jurisdiction on military commissions over enemy trial.⁵¹ The same day, the President issued an executive order creating a military commission and directing that the Commission try the eight captured saboteurs "as soon ... as is practicable."⁵² President Roosevelt created the Commission without expressly consulting Congress.⁵³ Nevertheless, he grounded his authority to create the Commission on "statutes of the United States," in addition to the Constitution and his position as Commander-in-Chief.⁵⁴

from one of the saboteurs. *Safire*, *supra* note 3. After President Roosevelt's death, President Truman established another World War II military commission to try the Far East Command. *See In re Yamashita*, 327 U.S. 1 (1946); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

⁵¹ Proclamation No. 2561: Denying Certain Enemies Access to the Courts of the United States, 3 C.F.R. (1938-1943 Compilation) 309 (1968), *reprinted in*, 56 Stat. 1964 (1942).

⁵² Military Order of July 2, 1942: Appointment of a Military Commission, 3 C.F.R. (1938-1943 Compilation) 1308 (1968).

⁵³ *Quirin*, 317 U.S. at 28-29.

⁵⁴ Proclamation No. 2561, 3 C.F.R. (1938-1943 Compilation) 309; Military Order of July 2, 1947, 3 C.F.R. (1938-1943 Compilation) 1308. After Roosevelt declared a national state of emergency on May 27, 1941, the "Attorney General Frank Murphy collected a list of statutes that became active on proclamation of a state of emergency or of war" even if the United States remained neutral. FISHER, *supra* note 27, at 69.

President Roosevelt recognized that his war powers as Commander-in-Chief were limited. He felt that as executive he was authorized to take any action necessary to protect the United States, unless the Constitution or the laws of the United States expressly prohibited that action. KOMMERS & FINN, *supra* note 17, at 287. In fact, President Theodore Roosevelt had expressed this view years before World War II started:

I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or the laws.

THEODORE ROOSEVELT, AUTOBIOGRAPHY 357 (Charles Scribner's Sons 1920).

President Roosevelt exercised his authority as Commander-in-Chief to its fullest when he authorized, without consulting Congress, the internment of thousands of people of Japanese ancestry without trial after the attack on Pearl Harbor. *See* Exec. Order No. 9066: Authorizing the Secretary of War to Prescribe Military Areas, 3 C.F.R. (1938-1943 Compilation) 1092 (1968). The Court upheld the President's Order, stating that "we cannot reject as unfounded the judgment of the military authorities and of Congress" that internment was necessary to protect the United States. KOMMERS & FINN, *supra* note 17, at 292. Justices Murphy and Jackson in their dissents insisted that even in times of war, military discretion must have limits and that internment based on race was going too far. *Id.* President Bush has also authorized the detaining of legal aliens for questioning. November 13 Order, *supra* note 4, § 3(a), at 57,834. There is no limit to the length of detention, and there is no sunset provision in the November 13 Order itself. *See id.*

Persons in the military, civilians, citizens, and non-citizens were all subject to the jurisdiction of the Commission.⁵⁵ Any person who (1) entered or attempted to enter the United States during a time of war and (2) was charged with committing, attempting, or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, was subject to jurisdiction of the Commission.⁵⁶ The Commission would hear cases based on the law of war.⁵⁷ Persons who were subject to the Commission were excluded from any of the courts of the United States.⁵⁸ The Proclamation gave the Attorney General the authority to create regulations,⁵⁹ and the military order gave the commission the right to make its own procedural rules.⁶⁰

⁵⁵ Proclamation No. 2561, 3 C.F.R. (1938–1943 Compilation) 309. The Proclamation included “[a]ll persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation.” *Id.* Citizens and civilians as well as military officers could have fit this description.

⁵⁶ *Id.* The Proclamation stated that any persons:

who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of the military tribunals.

Id.

⁵⁷ See *supra* note 55–56.

⁵⁸ Proclamation No. 2561, 3 C.F.R. (1938–1943 Compilation) 309. The Proclamation stated that “such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions.” *Id.*

⁵⁹ 10 U.S.C. § 1554 (1946) (repealed 1950); Proclamation No. 2561, 3 C.F.R. (1938–1943 Compilation) 309. (stating that “except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe”). It is unclear whether the word “except” that introduces the Attorney General’s right to prescribe regulations allows the Attorney General simply to add to the President’s proclamation or to alter the proclamation.

⁶⁰ Military Order of July 2, 1942: Appointment of a Military Commission, 3 C.F.R. (1938–1943 Compilation) 1308 (1968). Roosevelt’s Order expressly noted that the Articles of War, 10 U.S.C. §§ 1471–1593a (1946) (§ 1522 repealed 1948; §§ 1471–1521, 1523–1578, 1581–1583, 1586–1590, 1593 repealed 1950; §§ 1579, 1580, 1584, 1585, 1591, 1592 transferred; § 1593a omitted as executed), gave military commissions the authority to make procedural rules. Military Order of July 2, 1942, 3 C.F.R. (1938–1943 Compilation) 1308. Although the Articles of War established procedural rules for military trials, 10 U.S.C. §§ 1488–1508 (1946) (repealed 1950), the Articles of War also gave the President the authority to make procedural rules for military commissions. 10 U.S.C. § 1509 (1946) (repealed 1950).

Roosevelt’s Order required that all evidence of a probative value, as determined by the president of the Commission, be admissible. Military Order of July 2, 1942, 3 C.F.R. (1938–1943 Compilation) 1308. Conviction and sentence required a two-thirds vote of the members of

B. Supreme Court Approves Commission Jurisdiction over Saboteurs

Shortly after the government appointed lawyers to the eight Nazi saboteurs, those lawyers filed a writ of habeas corpus in the federal court for the District of Columbia, challenging the jurisdiction of the military commission over the saboteurs.⁶¹ The Supreme Court convened a special summer session to hear *Ex parte Quirin*,⁶² the appeal of the district court's denial of the Nazis' habeas corpus applications.⁶³

The *Quirin* Court addressed two central issues. The first was whether the Court had the power to hear the appeal of the habeas corpus petition, despite that the Presidential Proclamation denied the Nazis the right to the writ of habeas corpus.⁶⁴ The second issue was whether President Roosevelt had the authority to submit the Nazi defendants to trial by military commission.⁶⁵

the Commission present. *Id.* The record on the trial, including any judgment or sentence, was to be delivered to President Roosevelt for his action. *Id.*

The White House released the following statement on August 8, 1942, after the trial and executions were complete:

The President completed his review of the findings and sentences of the Military Commission appointed by him on July 2, [1]942, which tried eight Nazi saboteurs.

The President approved the judgment of the Military Commission that all of the prisoners were guilty and that they be given the death sentence by electrocution.

However, there was a unanimous recommendation by the Commission, concurred in by the Attorney General and the Judge Advocate General of the Army, that the sentence of two of the prisoners be commuted to life imprisonment because of their assistance to the Government of the United States in the apprehension and conviction of the others.

The commutation by the President in the case of Burger was to confinement at hard labor for life. In the case of Dasch, the sentence was commuted by the President to confinement at hard labor for thirty years.

The electrocutions began at noon today. Six of the prisoners were electrocuted. The other two were confined to prison.

The records in all eight cases will be sealed until the end of the war.

Statement from the White House on the Sentences of Eight Nazi Saboteurs Landed by Submarine on the Long Island and Florida Shores on June 13 and 17, 1942 (Aug. 8, 1942), <http://www.ibiblio.org/pha/policy/1942/420808a.html> (last visited Oct. 21, 2002). That statement was the only information the Roosevelt Administration disclosed to the public regarding the trial of the saboteurs. Notice that the executive branch disclosed no information about the commission until after the saboteurs, whom the commission sentenced to death, were executed. *See id.*

⁶¹ *Ex parte Quirin*, 317 U.S. 1, 19–20 (1942).

⁶² *Id.*

⁶³ *Id.* at 18–19. The Court met on Wednesday, July 29, 1942, pursuant to Chief Justice Stone's order. *Id.* All of the Associate Justices agreed to convene the special session. *Id.*

⁶⁴ *Id.* at 18–19, 23.

⁶⁵ A majority of the Court could not agree on whether the President was permitted to establish a procedure for the commission that conflicted with the procedure laid out in the

First, the Court concluded that the petitioners could properly seek the assistance of the federal courts, despite that President Roosevelt's Proclamation of July 2, 1942, seemed to deny the eight Nazi saboteurs access to the federal courts.⁶⁶ The Court recognized the exigencies of war, stating that the President's orders "as Commander-in-Chief . . . in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."⁶⁷ The Court held that the President could never deny federal courts the right to hear habeas corpus petitions to decide whether a military commission had jurisdiction over a particular defendant.⁶⁸

Second, the Court found that Congress gave the President the authority to establish military commissions and that the President acted within the confines of that authority.⁶⁹ According to the Court, Congress had the power to define and

Articles of War for military tribunals. *Id.* at 47. Petitioners listed the following Articles of War as conflicting with President Roosevelt's procedure for the Military Commission: Article of War 38, 10 U.S.C. § 1509 (1946) (repealed 1950) (explaining that the President may prescribe rules); Article of War 43, 10 U.S.C. § 1514 (1946) (repealed 1950) (articulating when the death sentence is lawful); Article of War 46, 10 U.S.C. § 1517 (1946) (repealed 1950) (articulating what action the convening authority may take); Article of War 50.5, 10 U.S.C. § 1522 (1946) (repealed 1948) (explaining how the hearings would be reviewed); and Article of War 70, 10 U.S.C. § 1542 (1946) (repealed 1950) (explaining charges and how the tribunal could act on charges).

Nevertheless, the Court stated it did not need to agree on the issue because the question on appeal was whether the district court properly determined that the Military Commission had jurisdiction over the saboteurs. *Quirin*, 37 U.S. at 47.

⁶⁶ Boris I. Bittker, *The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment By the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction*, 14 CONS. COMMENT. 431, 432 (1997).

⁶⁷ *Quirin*, 317 U.S. at 25.

⁶⁸ *Id.* ("[N]either the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."). The Court explained that there was nothing in the Proclamation that precluded access to the courts for determining whether the Proclamation applies to the particular case. *Id.* The Court cited *Milligan* to demonstrate that the Supreme Court has certiorari jurisdiction to review a lower court's refusal to issue a writ of habeas corpus even when the President and Congress have suspended the privilege of the writ of habeas corpus. *Id.* at 24. See *supra* note 34–45 and accompanying text for review of *Milligan*. The Court also cites as authority for upholding the Military Commission that "[d]uring the Civil War the military commission was extensively used for the trial of offenses against the law of war." *Quirin*, 317 U.S. at 32 n.10. See *supra* note 36 and accompanying text (noting that the *Milligan* Court found that neither the President nor Congress could suspend the writ of habeas corpus to challenge jurisdiction of the commissions).

⁶⁹ *Quirin*, 317 U.S. at 26–28. See also REDISH-SHERRY, *Chapter 2: Congressional Power to Control Federal Jurisdiction*, FEDERAL COURTS 106–92 (5th ed. 2002) for a discussion of Congress's ability to limit the jurisdiction of Courts established under Article III of the Constitution. Professor Sanford N. Caust-Ellenbogen of The Ohio State University Moritz

punish offenses against the law of nations.⁷⁰ Congress expressly provided in the Articles of War that military commissions “shall” have jurisdiction to try offenders or offenses against the law of war in appropriate cases.⁷¹ The Court also recognized that the law of nations, particularly the law of war, permitted military commissions to hear violations of the law of war.⁷² The Court did not address the question of whether a President would have authority to establish military commissions without congressional authorization.⁷³

Once the Court decided that the President did have authority to establish the military commissions, the Court addressed whether the Nazi defendants were within the permissible jurisdictional scope of the military commissions, as authorized by the Articles of War.⁷⁴ The Court stated that to find jurisdiction of the military commission proper, it needed to find both that the acts charged were offenses that the law of war deemed within the jurisdiction of military commissions, and that the Constitution did not require that the particular offense, be tried before a jury.⁷⁵

College of Law has queried whether the Executive has the authority to establish military tribunals in light of the fact that Article III delegates to Congress the power to establish lower federal courts. Sanford N. Caust-Ellenbogen, Professor of Law, Lecture on Federal Courts at The Ohio State University Moritz College of Law (Aug. 22, 26–27, 2002). Arguably, Congress established military tribunals as lower federal courts and provided that those tribunals would have jurisdiction over violations of the law of war when it enacted the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 821–946 (2000). *See infra* Part IV for a discussion of the role in setting up individual military tribunals that Congress gave to the Executive.

⁷⁰ *Quirin*, 317 U.S. at 26–28.

⁷¹ *Id.* The Articles recognized that military commissions appointed by military command constituted an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by courts-martial. Article 12, 10 U.S.C. § 1483 (1946) (repealed 1950); Article 15, 10 U.S.C. § 1486 (1946) (repealed 1950). Articles 38 and 46 authorized the President to prescribe the procedure for military commissions with limited reservations. 10 U.S.C. §§ 1509, 1517 (1946) (repealed 1950). Articles 81 and 82 authorized trial, either by courts-martial or military commission, of those charged with relieving, harboring, or corresponding with the enemy, and those charged with spying. 10 U.S.C. §§ 1553, 1554 (1946) (repealed 1950).

⁷² *Quirin*, 317 U.S. at 26–28.

⁷³ *Id.* at 29. The Court in fact explicitly stated that “[I]t is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.” *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* According to the Court, not all acts that international law deemed offenses against the law of war would be triable by military commission in the United States. The United States does not recognize jurisdiction of military commissions over acts that the federal courts do not recognize as violations of the law of war or offenses that the Constitution requires be tried only by a jury. *Id.* at 29.

First, the Court found that the saboteurs had committed offenses over which the laws of war allowed military commission jurisdiction.⁷⁶ The Court recognized that Congress had not enacted a statute that defined the “law of war.”⁷⁷ Rather, Congress “adopted by reference the sufficiently precise definition of international law.”⁷⁸ The Court determined that under international law the defendants’ acts—coming onto American soil in their military uniform, and then changing into civilian clothes with the intent to destroy American life and property—violated the law of war.⁷⁹

Second, the Court found that actions by unlawful belligerents were not offenses that the Constitution requires be tried by a jury.⁸⁰ Although not expressly excepted from the Sixth Amendment’s requirement of trial by jury,⁸¹ the Court

⁷⁶ *Id.* at 48.

⁷⁷ *Id.* at 30.

⁷⁸ *Quirin*, 317 U.S. at 29.

⁷⁹ *Id.* at 31. The Court looked to the 1907 Hague Convention, Great Britain’s War Office Manual of Military Law, and several studies on international law to determine the law of nations. *Id.* at 30 n.7. Under the Hague Convention, citizens as well as aliens could be unlawful belligerents. *Id.* at 37. After reviewing the Hague Convention, the Court determined that under international law only “unlawful combatants” were subject to the jurisdiction of military commissions, and even then only for “acts which render their belligerency unlawful.” *Id.* at 31. The Court also looked to the Rules of Land Warfare promulgated by the War Department for the international law standard of an unlawful belligerent. *Id.* at 37.

One of the saboteurs, petitioner Haupt, claimed that he became a citizen of the United States when his parents were naturalized and that he never lost that citizenship. *Id.* at 20. Consequently, the Court examined whether under international law a citizen was subject to jurisdiction of a military commission. *Id.* at 37–38. The Court noted that, under the Hague Convention, “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.” *Id.* The Court found, therefore, that “[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war,” nor are persons who commit hostile acts against the United States “any the less belligerents if . . . they have not . . . entered the theater or zone of active military operations.” *Id.* Under the laws of war, the Court noted that Haupt’s citizenship would not matter to the jurisdiction of the Commission. *Id.*

According to the Court, the Fifteenth Article of War demonstrates the United States’ recognition of this international law. *Id.* at 35–36. The Court went on to specify that “[i]t is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States.” *Id.* at 37. Al Qaeda terrorists who hijacked planes on September 11, 2001, to destroy the World Trade Center and the Pentagon therefore would fit under “unlawful belligerent” statutes under the *Quirin* logic.

⁸⁰ *Id.* at 40. See *infra* notes 119–25 and accompanying text for discussion of why the *Quirin* Court held that the Constitution does not require a jury trial under military commissions.

⁸¹ U.S. CONST. amend. VI. Actions are not included in “cases arising in the land or naval forces.” *Quirin*, 317 U.S. at 40.

concluded that the writers of the Constitution never contemplated that trials against unlawful belligerents would require a trial by jury.⁸² The Court emphasized that when the founding fathers wrote the Constitution, they were aware that military commissions, which did not provide for trial by jury, tried unlawful belligerents.⁸³ The Court held that, under the Articles of War, the Constitution, and the international laws of war, a military commission properly had jurisdiction over the Nazi saboteurs.⁸⁴

C. Important Points to Remember from the Quirin Decision

There are four points to remember from *Quirin* that are important in the next section's analysis of President Bush's military commissions. First, when evaluating whether jurisdiction over the saboteurs was proper, the *Quirin* Court focused on the Articles of War enacted by Congress. The Court noted that because President Roosevelt had cited the Articles of War in his Order creating the military commission, his commissions were bound to the jurisdictional scope provided for in the Articles of War.⁸⁵ Namely, military commissions could only have jurisdiction over unlawful belligerents.⁸⁶ A person may violate the law of war without necessarily becoming an *unlawful* belligerent.⁸⁷ When lawful belligerents violate the law of war, they must be tried by court martial or regular civilian court.⁸⁸

Second, the Court looked to international law to define the law of war, and consequently to define the scope of the military commission. Importantly, the

⁸² *Quirin*, 317 U.S. at 41.

⁸³ *Id.*; see also U.S. CONST. art. III, § 2, amended by U.S. CONST. amends. V, VI. The Court recites statements of international law, the Continental Congress, and the founding fathers to demonstrate that when the founding fathers drafted the Constitution they did not include unlawful belligerents in the cases that require trial by jury. Those statements assert that spies are subject to military commissions. *Quirin*, 317 U.S. at 41–43. The Court pointed to other situations in which it held that offenses did not require jury trial despite the lack of express exception from the Fifth Amendment. *Id.* at 39–40.

General George Washington convened a military commission to try Major André, a general to the British Army, for sneaking behind American lines in disguise, by simply sending a letter of instructions to the soldiers holding André. Marmoa et al., *supra* note 6, at 70.

⁸⁴ *Quirin*, 317 U.S. at 48.

⁸⁵ See *supra* notes 71–75 and accompanying text.

⁸⁶ See *supra* note 79 and accompanying text.

⁸⁷ See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; see also Protocol Additional I to the Geneva Conventions, Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

⁸⁸ See *supra* note 86.

Court found that both citizens and aliens are subject to military commissions when they violate the law of war.⁸⁹

Third, the Court emphasized that the Nazi defendants were charged with violations that were clearly within the laws of war, which Congress recognized as federal law. The jurisdictional key to finding a clear violation was that the defendants *entered* the United States *disguised* as civilians with the intent to cause harm to the United States.⁹⁰

Finally, the Court did not take a position on what procedural requirements, if any, a military commission must abide by, either under the laws of the United States or under the law of war.⁹¹

IV. PRESIDENT GEORGE W. BUSH'S MILITARY COMMISSIONS

On November 13, 2001, President Bush issued a military order⁹² asserting his authority to establish military commissions to try suspected terrorists.⁹³ This November 13 Order has generated a wave of commentary on whether the President's military commissions are constitutional.⁹⁴ The arguments that President Bush's November 13 Order is unconstitutional can be divided into two main criticisms: (1) President Bush exceeded his constitutional authority as Chief Executive Officer and Commander-in-Chief and therefore violated the doctrine of separation of powers when he claimed the right to establish military commissions without express approval from Congress; and (2) President Bush's November 13

⁸⁹ *Quirin*, 317 U.S. at 37–38 (noting that under the Hague Convention, citizens as well as aliens could be unlawful belligerents). The *Quirin* Court went so far as to distinguish *Milligan*. The Court stated that the Articles of War subjected any person who violated the law of war to trial by military commission, regardless of whether that person was a citizen and the civil courts were open. *Id.* at 24, 37, 48. See *infra* Part IV.B.1 for a discussion of jurisdictional limitations on military commissions created under the laws of war.

⁹⁰ See *Quirin*, 317 U.S. at 36–37.

⁹¹ See *id.* at 46–48.

⁹² See *supra* note 4 for the distinction between a military order and an executive order.

⁹³ See *supra* notes 4–5.

⁹⁴ More than forty New York Times articles were written specifically on the November 13 Order between November 13 and December 31, 2001. See, e.g., William Glaberson, *A Nation Challenged: The Justice System: Critics' Attack on Tribunals Turns to Law Among Nations*, N.Y. TIMES, Dec. 26, 2001, at B1; Anthony Lewis, *Abroad at Home: Right and Wrong*, N.Y. TIMES, Nov. 24, 2001, at A27; Neil A. Lewis, *The Investigation: Ashcroft Offers Accounting of 641 Charged or Held*, N.Y. TIMES, Nov. 28, 2001, at A1; James Orenstein, *Rooting Out Terrorists Just Became Harder*, N.Y. TIMES, Dec. 6, 2001, at A35; Jeffrey Rosen, *The Nation: What Price Security?: Testing the Resilience of American Values*, N.Y. TIMES, Nov. 18, 2001, § 4, at 1; Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23; Robin Toner & Neil A. Lewis, *White House Push on Security Steps Bypasses Congress*, N.Y. TIMES, Nov. 15, 2001, at A1.

Order violates constitutional due process requirements by impermissibly infringing on the civil liberties of the persons subject to the Order.

In defending the November 13 Order, the Bush Administration has repeatedly referred to the fact that presidents of the past had established military commissions.⁹⁵ This section examines whether Lincoln and Roosevelt's use of military commissions supports the constitutionality of President Bush's authority to establish military commissions and his authority to adopt the specific procedures provided for in his November 13 Order. As the following discussion reveals, President Bush's military commissions are likely to withstand constitutional attack when read in light of limiting regulations.

A. Does President Bush Have the Authority to Establish Military Commissions?

President Bush has claimed that the foundations for his authority lie in both his role as Commander-in-Chief⁹⁶ and in statutory provisions. He also points to the actions of Presidents Lincoln and Roosevelt, both of whom, he asserts, established military commissions without asking for Congress's permission.⁹⁷

⁹⁵ President Bush said on November 19: "I would remind those who don't understand the decision I made [to establish military commissions] that Franklin Roosevelt made the same decision in World War II. Those were extraordinary times as well." Stephen Robinson, *Bush Embraces Big Government After All*, NEWS.TELEGRAPH.CO.UK, at <http://www.portal.telegraph.co.uk/news/main.jhtml?xml=/news/2001/11/22/wbush122.xml> (Nov. 22, 2001); see also Steven Lee Myers & Neil A. Lewis, *Assurances Offered about Military Courts*, N.Y. TIMES, Nov. 16, 2001, at B10 (noting that the Department of Defense would review military commission precedents in American history when writing the procedures for the military commission); see, e.g., Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 (noting that military commissions were used during the Civil War and World War II).

⁹⁶ The Bush Administration claims that as Commander-in-Chief the President has authority to establish military commissions without Congress's express authorization. See, e.g., Elisabeth Bumiller, *Military Tribunals Needed in Difficult Time, Bush Says*, N.Y. TIMES, Nov. 20, 2001, at B5; Neil A. Lewis, *Ashcroft Defends Antiterror Plan; Says Criticism May Aid U.S. Foes*, N.Y. TIMES, Dec. 7, 2001, at A1; David E. Sanger, *President Defends Military Tribunals In Terrorist Cases*, N.Y. TIMES, Nov. 30, 2001, at A1.

⁹⁷ See *supra* note 95. Like President Bush, President Lincoln and President Roosevelt cited their constitutional power as Commander-in-Chief of the armed forces as a source of their authority to create military commissions and suspend the privilege of the writ of habeas corpus. See November 13 Order, *supra* note 4; Proclamation No. 2561: Denying Certain Enemies Access to the Courts of the United States, 3 C.F.R. (1938-1943 Compilation) 309 (1968), reprinted in, 56 Stat. 1964 (1942). President Lincoln referred to his authority as Commander-in-Chief when defending his establishment of military trials and suspension of habeas corpus. See *supra* notes 27-30 and accompanying text. President Lincoln repeatedly emphasized that he believed the Constitution gave Congress the authority to suspend habeas corpus and to establish military trials, even during times of war. See, e.g., *id.* Nevertheless, he also felt that as

This note will look to both the Civil War precedent and the World War II precedent, to evaluate (1) whether President Bush has the authority to establish military commissions under his Commander-in-Chief powers and without the express authorization of Congress; and (2) whether President Bush has the authority to establish military commissions under legislation enacted by Congress.

1. Civil War Precedent

The *Milligan* Court explicitly held that the Constitution, in particular the President's power as Commander-in-Chief, did not give a president the authority to establish a military commission without the authorization of Congress.⁹⁸ The Court also held that even Congress could not authorize the President to establish a military commission to hear cases of civilians who violated civil laws when civil

Commander-in-Chief of the armed forces, the President had the authority to suspend habeas corpus and to establish military commissions when the national security required such measures. See KOMMERS & FINN, *supra* note 17, at 291. Yet when a circuit court ruled Lincoln's acts unconstitutional, he continued to try civilians and military alike under military commissions and to suspend habeas corpus. See *supra* text accompanying note 26. In some sense, then, Lincoln seemed to view his authority as Commander-in-Chief above the authority of the courts. Congress's ratification of Lincoln's actions could have meant either that Congress acknowledged his authority to act when Congress was not in session or that Congress acknowledged the need for military courts and the suspension of habeas corpus. See *supra* notes 31–33 and accompanying text; see also Military Order of July 2, 1942: Appointment of a Military Commission, 3 C.F.R. (1938–1943 Compilation) 1308 (1968). In his 1942 Order establishing the military commission to try the German saboteurs, President Roosevelt wrote, "NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and the statutes of the United States, do hereby proclaim . . ." Proclamation No. 2561, 3 C.F.R. (1938–1943 Compilation) 309.

⁹⁸ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). The Court noted that "[i]f there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings." *Id.* at 119. The "law" that the Court referred to was an express congressional act. *Id.*

If *Milligan* is read narrowly and limited to its facts, the holding stands for the rule that the President does not have the authority to try citizens for civil crimes in military commissions without the express authorization of Congress while the civil courts are open. Because Bush's Military Order excludes citizens, the narrow *Milligan* holding would not apply. However, *Milligan* is not necessarily so narrow. Although the *Milligan* Court's finding specifically relates to citizens (because *Milligan* was a citizen of the United States), the Court's holding seems to apply to all civilians. The Court in *Milligan* stated: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection *all classes of men, at all times . . .*" *Milligan*, 71 U.S. (4 Wall.) at 120 (emphasis added).

courts were open.⁹⁹ The Court implied, however, that Congress or the President could establish a military commission to hear violations of the laws of war when civil courts were open.¹⁰⁰

Military commissions can hear three types of cases.¹⁰¹ Lincoln authorized the second type: a commission to try civilians for actions that did not violate the laws of war.¹⁰² The *Milligan* decision complied with the common law rule that military commissions may only try civil crimes when the civil courts are closed.¹⁰³ That the Union used military commissions extensively during the Civil War to try offenses against the law of war further demonstrates that the *Milligan* holding is limited to one type of case triable under military commission—trial of civilians for violation of civil law.¹⁰⁴

The Bush administration has claimed that the November 13 Order only applies to the third type of cases covered by military commissions—violations of the laws of war.¹⁰⁵ If this is so, arguably *Milligan's* holding that the President does not have independent authority to establish military commissions does not apply to Bush's November 13 Order. There is debate, however, over whether the text of the November 13 Order itself is limited to violations of the law of war, since the Order states that "it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war *and other applicable laws* by military tribunals."¹⁰⁶ Individuals subject to the order

⁹⁹ *Id.* at 121–22. The Court held that "no usage of war could sanction a military trial . . . for any offence whatever of a citizen in civil life, in nowise connected with the military service." *Id.*

¹⁰⁰ See *Milligan*, 71 U.S. (4 Wall.) at 119–20, 121–23.

¹⁰¹ See *supra* note 6 (outlining the three types of cases military commissions can hear).

¹⁰² See *Milligan*, 71 U.S. (4 Wall.) at 121–22. On the other hand, readers of *Milligan* could interpret some sections of the Court's holding as saying that the President *never* has the authority to establish military commissions without Congress's express authorization because the Constitution gives Congress, not the President, the authority to establish inferior courts. See *supra* note 21 accompanying text. The Court noted that the President "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.'" *Id.* at 121.

¹⁰³ See *Milligan*, 71 U.S. (4 Wall.) at 121–22.

¹⁰⁴ See *Ex parte Quirin*, 317 U.S. 1, 31 (1942). Under the November 13 Order the military commissions have exclusive jurisdiction over individuals subject to the Order. In distinguishing its holding from *Milligan*, the *Quirin* Court stated, "During the Civil War the military commission was extensively used for the trials of offenses against the law of war." *Id.* at 31 n.10.

¹⁰⁵ See, e.g., Lewis, *supra* note 96 (noting that Ashcroft defended the Bush November 13 Order by explicitly assuring Congress that the military commissions would only try war crimes); Neil A. Lewis, *Rules on Tribunal Require Unanimity on Death Penalty*, N.Y. TIMES, Dec. 28, 2001, at A1.

¹⁰⁶ November 13 Order, *supra* note 4, § 1(e), at 57,833 (emphasis added); see, e.g., DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Before

cannot "seek any remedy or maintain any proceeding" in any court other than the military commission created under the November 13 Order.¹⁰⁷ Therefore, on its face, Bush's November 13 Order covers civil trials, in addition to war crimes trials, committed by any non-citizens regardless of whether they are civilians or members of a military. To the extent that Bush's military commissions have jurisdiction over civilians for civil crimes, the November 13 Order would be constitutional under the *Milligan* holding. Again, the *Milligan* Court noted that there might be an argument that the "laws and usages of war" would authorize the President, as Commander-in-Chief, to establish a commission independently.¹⁰⁸

the S. Comm. on the Judiciary, 107th Cong. (statement of Dr. Neal Katyal, Professor of Law, Georgetown University Law Center) (Nov. 28, 2001), http://www.judiciary.senate.gov/testimony.cfm?id=126&wit_id=72 (last visited Oct. 21, 2002).

¹⁰⁷ November 13 Order, *supra* note 4, § 7(b)(1)–(2), at 57,835–36.

¹⁰⁸ *Id.* Note that if President Bush's military commissions are established under the laws of war, the 1949 Geneva Conventions require that the commission only have jurisdiction over persons connected to a state involved in a declared war or an armed conflict with the United States. Committee on Military Affairs, *supra* note 1, at 11; *see also infra* note 137 and accompanying text.

Some critiques assert that, by claiming independent authority to establish military commissions, the President violates the separation of powers doctrine by usurping the law-making duties and judicial review duties that the Constitution delegated to the legislative and the judicial branches, respectively. *See, e.g., supra* note 8. They emphasize that the Framers purposely divided power among three branches to prevent the tyranny of one. Therefore, they assert that the separation of powers doctrine requires the President to receive the express permission of Congress to establish a military commission. Katyal, *supra* note 106. These scholars assert that Congress could give the President that power in one of two ways: (1) through a declaration of war, or (2) by permission to establish military commissions. *Id.* They note that congressional authorization would legitimize the commissions and would make the constitutionality of their holdings much more secure. *Id.*

The Declaration of Independence lists several complaints that the American colonists had against King George III of England. Among those complaints, the writers noted: "He has affected to render the Military independent of and superior to the Civil Power"; the King was guilty of "depriving us, in many Cases, of the Benefits of Trial by Jury"; and the King had "made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." Katyal, *supra* note 106. King George III likely found his actions necessary to prevent an uprising in the colonies, two thousand miles away from England. Critics of President Bush's November 13 Order note that there is no civil check over the commissions—no jury trials—and that the military judges will be members of the executive branch subject to the President's favor. *See, e.g., supra* notes 3, 8 and accompanying text. Arguably, President Bush is acting tyrannically, similar to the way in which the founding fathers characterized King George III in the Declaration of Independence.

In *Milligan*, the Supreme Court warned against diminishing the safeguards provided for by the Constitution's separation of powers in times of war:

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt

Nevertheless, the Court declined to consider this argument because the laws of war did not apply when a citizen violated a civil law.¹⁰⁹

2. *The World War II Precedent*

The *Quirin* Court expressly stated that it did not answer the question of whether the President independently had the authority to establish a military commission.¹¹⁰ There are several clues in the *Quirin* decision, however, that indicate a President has the *authority* to establish a military commission without the *express* authorization of Congress.

First, according to the *Quirin* Court, President Roosevelt had the authority to establish military commissions because Congress previously had authorized the President to establish military commissions when it enacted the Articles of War.¹¹¹ Specifically, the Court referred to Article 15¹¹² and Article 38¹¹³ as

of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate . . . [Our fathers] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation.

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 125 (1866). The *Milligan* Court found conviction of Lambdin P. Milligan unconstitutional because it violated separation of powers. *Id.* at 130. As a result, the Court freed Milligan despite that if “his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment” because conspiracies such as Milligan’s to overthrow the United States deserve “the heaviest penalties of the law.” *Id.*

President Bush’s November 13 Order gives the executive branch powers normally divided among the three branches: the power to establish military commissions as well as their jurisdiction and procedure; the power to try persons under military commissions and review those decisions; and the power to enforce the commissions’ decisions. Katyal, *supra* note 106.

Interestingly, military commanders first established military commissions because the commanders no longer wished to be solely responsible for the trial of unlawful belligerents such as spies and pirates. Marmoa et al., *supra* note 6, at 8. Therefore, commanders restricted their unlimited power and began using boards of officers to help try those deemed guilty of offenses against the law of war. *Id.*

¹⁰⁹ 71 U.S. (4 Wall.) at 121–22.

¹¹⁰ *Ex parte Quirin*, 317 U.S. 1, 29 (1942).

¹¹¹ The Supreme Court declared that the legislative sections Roosevelt cited did give the President authority to establish military commissions. *Quirin*, 317 U.S. at 26–28.

¹¹² 10 U.S.C. § 1486 (1946) (repealed 1950). See *infra* note 136 for the full text of Article 15.

¹¹³ 10 U.S.C. § 1509 (1946) (repealed 1950). See *infra* note 150 for the full text of Article 38.

giving the President authority to establish military commissions.¹¹⁴ In the November 13 Order, President Bush supported his authority to establish military commissions by citing provisions of the current UCMJ¹¹⁵ that are almost identical to the Articles President Roosevelt cited.¹¹⁶ According to the *Quirin*

¹¹⁴ *Quirin*, 317 U.S. at 26–28, 35, 46. Although President Roosevelt cited “the authority vested in me by . . . the statutes of the United States” as one source of authority for his Military Order creating the military commission, unlike President Bush he did not articulate which statutory provisions supported his Order. Proclamation No. 2561: Denying Certain Enemies Access to the Courts of the United States, 3 C.F.R. (1938–1943 Compilation) 309 (1968), *reprinted in*, 56 Stat. 1964 (1942); *see also Quirin*, 317 U.S. at 46.

¹¹⁵ President Bush’s November 13 Order cites three statutory sections as sources of authority for the Order: (1) the Authorization for Use of Military Force Joint Resolution; (2) 10 U.S.C. § 821; and (3) 10 U.S.C. § 836. November 13 Order, *supra* note 4. The Authorization for Use of Military Force Joint Resolution does not expressly mention military commissions; it merely gives the President the authority to use “military force” as he deems necessary in bringing perpetrators of the September 11 attacks to justice. Joint Resolution, *supra* note 1, at 225.

The Constitution gives Congress the authority to make rules for the government of the land and naval forces. U.S. CONST. art. I, § 8, cl. 14. In 1950, Congress replaced the Articles of War with the UCMJ. 10 U.S.C. §§ 801–946 (2000).

¹¹⁶ *See infra* notes 136, 150. President Roosevelt cited the Articles of War; President Bush cited the UCMJ. *Id.* The key to the statutory sections to which both President Roosevelt and President Bush cite is that military commissions may be used to try violations of the law of war. *See infra* note 127. One main difference between President Roosevelt’s Order and President Bush’s November 13 Order is that President Roosevelt’s Order was also backed by a formal declaration of war. Katyal, *supra* note 106. Both Lincoln and Roosevelt established their commissions after Congress had formally declared war. *Id.* A formal declaration of war logically activates the laws of war. In fact, all the military commissions established in the United States before Bush’s November 13 Order were established when Congress had declared war or when Congress had expressly authorized military commissions. *Id.*

Since World War II, however, Congress has ratified the 1949 Geneva Conventions, which state that the laws of war also apply during a period of armed conflict or aggression. Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 196 n.117 (2000) (noting that “the United States ratified the four Geneva Conventions of 12 August 1949 on 2 August 1955”). The four Geneva Conventions are as follows:

- (1) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31;
- (2) Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85;
- (3) Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and
- (4) Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT’L L. 764, 764 n.2 (1981).

Within one week of the terrorist attacks on the Pentagon and the World Trade Center, Congress authorized military action to the extent the President deemed necessary. Joint

Court's logic, therefore, President Bush did not need express authorization from Congress to establish military commissions because Congress previously had authorized the President to establish military commissions under the UCMJ.¹¹⁷ The similarities between the Code provisions that President Roosevelt cited and the Code provisions that President Bush cited indicate that President Bush is justified in referring to Roosevelt's creation of military commissions as precedent for his authority to create military commissions without additional congressional assent.¹¹⁸

Second, the *Quirin* Court emphasized that military commissions predated the Constitution.¹¹⁹ The *Quirin* Court held that the Framers did not intend to change the pre-Constitution common law rules of military commissions.¹²⁰ Under the

Resolution, *supra* note 1. However, Congress neither explicitly authorized military commissions nor formally declared war. After the Islamic fundamentalist Taliban organization, which controlled Afghanistan, refused to surrender the al Qaeda leaders, the United States, with the help of the United Kingdom, launched a military campaign against Taliban forces in Afghanistan. President George W. Bush, Remarks on the Start of Military Action in Afghanistan (Oct. 7, 2001), http://abcnews.go.com/sections/world/DailyNews/strike_bushtrans011007.html (last visited Oct. 21, 2002).

¹¹⁷ Congress could always amend the UCMJ to restrict the President's authority. See *infra* note 208 (discussing the "later in time" doctrine).

¹¹⁸ Although President Bush seems to have the authority to create military commissions under the UCMJ and the laws of war, the laws of war also limit permissible personal and subject matter jurisdiction of any military commission he creates. See *infra* Part IV.B.

¹¹⁹ *Quirin*, 317 U.S. at 39.

¹²⁰ *Id.* at 41, 45. The Court reasoned that if the Framers had intended to change the common law on military commissions, they would have expressly stated so in the Constitution. *Id.* at 41-42. Because the Constitution implicitly authorized military commissions, the Court concluded "that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission." *Id.* at 45.

Quirin was not the only case in which the Supreme Court held that the Constitution does not expressly prohibit military commissions. For example, the Supreme Court held in *Madsen v. Kinsella* that "[s]ince our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war." 343 U.S. 341, 346 (1952). That American military leaders had utilized military commissions before the Constitution was created implies that the Constitution permits military commissions. *Marmoa et al.*, *supra* note 6, at 12.

Similarly, the United Nations has expressed the opinion that statutory authority did not create military commissions. *Marmoa et al.*, *supra* note 6, at 13 n.33. Rather, statutory law recognized military commissions. *Id.* The United Nations interpreted the *Quirin*, *Yamashita*, and *Homma* cases as agreeing with this point. *Id.* The U.N. authors stated:

In the exercise of the power conferred upon it by the constitution [sic] to "define and punish . . . offenses against the Law of Nations," of which the law of war is a part, the United States Congress has by a statute, the Articles of War, *recognised* the "Military Commission" appointed by military command, as it had previously existed in United

common law before the Constitution, high-ranking military commanders established military commissions.¹²¹ Although in the Constitution the Framers gave Congress the authority to “constitute Tribunals inferior to the supreme [sic] Court,”¹²² and to “define and punish¹²³ . . . Offenses against the Law of Nations,” the Constitution does not expressly state that military commanders do not have the authority to establish military commissions. Under the *Quirin* Court’s logic, therefore, it follows that the Constitution did not prevent the pre-Constitution common law authority of military commanders to establish military commissions when they thought necessary.¹²⁴ Consequently, by giving the Commander-in-Chief power to the President, the Constitution seems to have given the President the authority to establish military commissions.¹²⁵

States Army practice, as an appropriate tribunal for the trial and punishment of offences against the law of war.

I UNITED NATIONS WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 112 (8th ed. 1947) (emphasis added). According to the U.N., therefore, the Supreme Court did not hold that only Congress had the authority to establish military commissions; rather, Congress had the authority to recognize military commissions. *Id.*

¹²¹ In 1776 General George Washington charged Captain Nathan Hale with spying and tried him in a military commission. Colonel A. Wigfall Green, *The Military Commission*, 42 AM. J. INT’L L. 832, 832–33 (1942). General Washington also convened a military commission in 1780 to try Major John André of the British Army on the charge of acting as a spy. Marmoa et al., *supra* note 6, at 70. General Washington convened the commission to try Major André by simply sending a letter of instructions to the soldiers holding André. *Id.*; see also *supra* note 83 and accompanying text.

According to Colonel A. Wigfall Green, a military commission may have two sources of authority: common law and statutory. Green, *supra*, at 834. The law of war establishes the common law authority for the military commission. *Id.* Under the common law, a superior military commander usually appoints a military commission. *Id.* Unless there is a “directive of superior authority to the contrary,” the military commission is free to create its own rules of procedure. *Id.* A commission may also have statutory authority, such as when Congress provides for military commissions in the Articles of War. *Id.* Colonel Green notes, however, that statutory authority is usually only necessary to confer specific powers on the military commission. *Id.* The military commission is only bound by the restrictions and procedure set forth in statutes—such as the Articles of War and the Manual for Courts-Martial—when it is appointed under statutory authority. *Id.*

¹²² U.S. CONST. art. I, § 8, cl. 9.

¹²³ U.S. CONST. art. I, § 8, cl. 10.

¹²⁴ President Lincoln seems to have held a similar view. See *supra* note 30 and accompanying text (quoting Lincoln’s assertion that “it cannot be believed the framers of the [Constitution] intended, that in every case, the danger should run its course, until Congress could be called together . . .”).

¹²⁵ Because Article I lays out the powers and duties of the legislative branch, it is also possible to argue that the mere fact that the Framers mentioned military commissions in Article I impliedly vests Congress with the authority to establish military commissions. Such an argument would follow Justice Taney’s logic in *Merryman*. See *supra* note 22 and

B. Procedure and Due Process of the Commissions

President Bush's authority to establish military commissions either under his power as Commander-in-Chief or under specific legislation does not diminish the fact that the procedure of the established commissions must comport with constitutional due process. A major constitutional criticism of President Bush's November 13 Order is that it eliminates fundamental and unalienable freedoms and civil rights for defendants, especially the millions of legal aliens in the United States who are subject to the Order.¹²⁶ Nevertheless, there is a chance that the Supreme Court would interpret the November 13 Order to be constitutional under the Secretary of Defense's limiting regulations,¹²⁷ even if the President does not amend or Congress does not restrict the Order.¹²⁸

accompanying text (noting Justice Taney's assertion that, because the constitutional provision authorizing suspension of habeas corpus is located in Article I, only an act of Congress could authorize the suspension).

¹²⁶ See, e.g., Committee on Military Affairs, *supra* note 1, at 8; Lewis, *supra* note 3.

Critics have noted that U.S. federal courts have afforded constitutional rights to international criminals—including pirates, slave traders, hijackers, and terrorists—when the United States tried those criminals in federal court. *Id.* at 40; Harold Koh, *We Have the Right Courts for Bin Laden*, N.Y. TIMES, Nov. 23, 2001, at A39. Federal courts have even successfully tried and convicted al Qaeda members. Committee on Military Affairs, *supra* note 1, at 40.

Additionally, the Supreme Court has expressly stated that the Court extends constitutional protections to aliens. *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886) (noting that the Fourteenth Amendment is not confined to protection of citizens, and that the United States had signed a treaty with China to enforce its citizens' rights). "But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that *it was the alien's presence within its territorial jurisdiction* that gave the Judiciary power to act." *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) (emphasis added). Today, however, international treaties and customary international law have expanded the scope of permissible jurisdiction beyond the mere presence of the defendant in the United States. Mary Ellen O'Connell, Professor of Law, Lecture on International Dispute Resolution at The Ohio State University Moritz College of Law (Nov. 8, 2001) (discussing *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), in which the court exercised universal rather than territorial jurisdiction over a foreign human rights abuser). Other commentators have noted that due process rights afforded to defendants in federal courts would hinder the government from effectively fighting the war on terrorism and thereby ensuring national security. See Committee on Military Affairs, *supra* note 1, at 40.

¹²⁷ Department of Defense Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, Mar. 21, 2002, <http://news.corporate.findlaw.com/hdocs/docs/dod/dod032102milcomord1.pdf> [hereinafter March Regulations or Regulations] (last visited Oct. 20, 2002).

¹²⁸ See Lewis, *supra* note 128 (reviewing Congress members' statements that the regulations seem to be addressing constitutional concerns about the November 13 Order). There is no guarantee the Supreme Court would even be willing to hear a constitutional challenge to Bush's commission, even though under *Quirin* the Court has the right to hear a habeas corpus challenge to the jurisdiction of the military commissions. See generally John F. O'Connor, *The*

Other than affirming that defendants always have the right to challenge jurisdiction of a commission through a habeas corpus petition, the *Milligan* and *Quirin* Courts offer little express guidance on the minimum required procedure of military commissions.¹²⁹ Nevertheless, both cases seem to suggest that the President has the authority to establish the jurisdiction, method, and procedures of military commissions unless Congress provides otherwise.¹³⁰ Consequently, if

Origins and Application of the Military Deference Doctrine, 35 GA. L. REV. 161 (2000) (discussing the Supreme Court's tendency to defer to the executive branch's decisions during times of war).

¹²⁹ *Ex parte Quirin*, 317 U.S. 1, 46–47 (1942) (holding that the Court need not inquire into whether Congress could restrict the procedure of a military commission). According to the counsel for the government in *Milligan*, there was no precedent on the procedure of military commissions. His brief queried:

How is a military commission organized? What shall be the number and rank of its members? What offences come within its jurisdiction? What is its code of procedure? How shall witnesses be compelled to attend it? Is it perjury for a witness to swear falsely? What is the function of the judge-advocate What is the nature of their punishments? . . . To none of these questions can the Attorney-General or any one make a reply, for there is no law on the subject.

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 141–42 (1866). The *Milligan* Court did not even mention the procedure of the military commissions in its opinion. *Id.*

The *Milligan* and *Quirin* Courts did hold, however, that federal courts always have the power to hear habeas corpus petitions to review the jurisdiction of military commissions. *Milligan*, 71 U.S. (4 Wall.) at 130–31 (noting that *Milligan* was entitled to discharge because under the March 3, 1863 Act the military commission did not have jurisdiction over *Milligan*). The *Quirin* Court explicitly held that the President could not eliminate a defendant's right to the privilege of the writ of habeas corpus, even if that defendant was an unlawful, alien belligerent. *Quirin*, 317 U.S. at 25. According to the Supreme Court, all defendants had the right to challenge the military commission's jurisdiction over them. *Quirin*, 317 U.S. at 24–25. Yet the Court did not find that under Roosevelt's Order the same defendants had the right to appeal for a conviction by the military commission. *Id.*

¹³⁰ *Milligan* both focused on the fact that, under the March 3, 1863 Act, Congress said “no” to military commission jurisdiction, and that it left open the possibility that the President could establish military commissions to hear violations of the law of war. *See supra* notes 100–03 and accompanying text. The *Quirin* Court also focused on congressional limitations but left open the President's authority to act independently of Congress in establishing military commissions. *See supra* note 110 and accompanying text.

The Supreme Court has previously indicated that the President cannot act in contradiction of Congress's express statements. *See, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the “Steel Seizure Case”). President Truman seized steel mills under strike to ensure a supply of steel to the armed forces fighting the Korean War. The Court found the seizure unconstitutional because the President acted directly contrary to the specific intent of Congress in a matter subject to congressional power. *Id.* at 609–10.

Justice Jackson wrote in his famous concurring opinion:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own

the Department of Defense Regulations comply with limitations Congress previously placed on the procedure of military commissions, the procedure of President Bush's military commissions may be constitutional.¹³¹

constitutional powers minus any constitutional powers of Congress over the matter Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637–38. Justice Jackson went on to note that neither the President's executive powers nor his power as Commander-in-Chief could give him the power to act contrary to Congress's express statement, even in time of war. *Id.* at 645.

Military commissions are not necessarily subject to standard constitutional minimum due process requirements. *Supra* note 120 and accompanying text (discussing the *Quirin* Court holding that military commissions are exempt from the Sixth Amendment due process guarantees).

¹³¹ Months before the Secretary of Defense issued its regulation, Administration employees issued reports of leaked drafts of the regulations indicating that the Administration intended to write limiting regulations that would comply with congressional statements in the UCMJ and the USA Patriot Act. Thomas M. DeFrank, *Retreat on Military Tribunals: After Uproar, White House to Ease Terror Trial Rules*, DAILY NEWS (New York), Jan. 6, 2002, at 24. For example, the leaked regulations required unanimous death penalty verdicts, mandatory appeals, a presumption of innocence, and possibly civilian judges on the commission. *Id.*

Even if the Court were to find some sections of the November 13 Order unconstitutional, the entire Order may not necessarily be struck down. *See* Committee on Military Affairs, *supra* note 1, at 26. The Court in *Quirin* declared the provision of Roosevelt's Order that denied habeas corpus unconstitutional. *Id.* The Court did not discuss severability but nevertheless upheld the Order as written despite its unconstitutional provision denying habeas corpus. *Id.* Neither the Roosevelt Order nor the Bush November 13 Order included severability provisions. *Id.* Both Orders did, however, include a provision allowing for amendment by regulations. *See* Proclamation, *supra* note 51; November 13 Order, *supra* note 4, § 4, at 57,834–35. The *Quirin* Court may have inferred a severability provision from the provision for regulation. Consequently, the current Court may also infer a severability provision in Bush's November 13 Order.

There is also the possibility, however, that the current Court may distinguish *Quirin*. Although the provision in President Bush's November 13 Order that denies habeas corpus is nearly identical to President Roosevelt's 1942 Order, there is a significant difference. The 1942 Order specifically provided for amendment of the denial of habeas corpus:

[S]uch persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, *except* under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

Proclamation, *supra* note 51, at 5101 (emphasis added).

President Bush's November 13 Order, on the other hand, generally states that the Secretary of Defense has the authority to issue regulations. November 13 Order, *supra* note 4, § 4(b), at 57,834. The general grant of authority to issue regulations is in section 4 of the November 13 Order, while the provision denying habeas corpus is in section 7 of the Order. *Id.* §§ 4(b), 7(b)(2), at 57,384–86. As written, the November 13 Order seems to indicate that even if the

Congress has not expressly regulated the procedure of military commissions since September 11. Nevertheless, this note proposes that there are three statutory provisions that limit the scope of permissible military commission procedure: first, Article 21 of the UCMJ;¹³² second, Article 36 of the UCMJ;¹³³ and third, section 412 of the Patriot Act.¹³⁴

1. Article 21 of the UCMJ

In his November 13 Order, President Bush cited as basis for his authority Article 21 of the UCMJ,¹³⁵ which is nearly identical to an Article of War the

Secretary of Defense issues regulations, persons subject to the Order still will not be able to file habeas corpus petitions.

Scholars have argued that even if Congress does not restrict the President's ability to create the procedure and jurisdiction for the military commission, the President does not have unlimited discretion over procedure and jurisdiction. *See, e.g.*, 11 Op. Att'y Gen 298 (1865). According to scholars, the common law of military tribunals has established default rules, or minimum procedural and jurisdictional requirements. *Id.* Consequently, to exceed the standard scope of military commissions, the President would need congressional authority. *Id.*

One United States Attorney General, Attorney General Speed, agreed that the President was restricted by the common law of military tribunals. *Id.* According to Speed:

A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare.

Id. According to this view, as Commander-in-Chief, the President can recognize the need for a military commission. If Congress does not act, the default procedural rules of the laws of war apply. Congressional action is only necessary to alter these default rules as to jurisdiction and procedure.

¹³² 10 U.S.C. § 821 (2000).

¹³³ 10 U.S.C. § 836 (2000).

¹³⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act [sic] of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350–52 (2001).

Additionally, Article 18 of the UCMJ seems to indicate that Congress expressly intended that general courts-martial and military commissions have concurrent jurisdiction over violations of the law of war. 10 U.S.C. § 821 (2000). The November 13 Order's grant of exclusive jurisdiction to military commissions conflicts with this express intent. Committee on Military Affairs, *supra* note 1, at 19.

¹³⁵ Article 21 of the UCMJ states that the Codes' creation of jurisdiction in courts-martial to try persons subject to the UCMJ does "not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . . or other military tribunals." 10 U.S.C. § 821. Article 21 does not expressly give the President authority to establish a military commission, but merely states that statutes and the law of war define the permissible jurisdiction of military commissions. *Id.*

Quirin Court recognized as authorizing President Roosevelt's military commission.¹³⁶ Article 21 notes that military commissions have jurisdiction "with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions."¹³⁷ Congress therefore limited the personal and subject matter jurisdiction of military commissions to persons and offenses that either Congress expressly authorizes or that the laws of war permit.¹³⁸ Congress has not enacted legislation that expressly authorizes jurisdiction of military commissions over particular persons or offenses.¹³⁹ However, international treaties have limited the personal and subject matter jurisdiction of military

¹³⁶ November 13 Order, *supra* note 4; Military Order of July 2, 1942: Appointment of a Military Commission, 3 C.F.R. (1938-1943 Compilation) 1308 (1968). Article 21 of the UCMJ states:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 (2000). Article 15 of the Articles of War states:

The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

10 U.S.C. § 1488 (1946) (repealed 1950).

¹³⁷ 10 U.S.C. § 821 (2000) (emphasis added). Under the law of war, a military commission may have personal jurisdiction over a person who does not commit a war crime. An occupying power "could use military commissions to try persons within occupied territory pending establishment of civil government" as the United States often did in the post-World War II occupation of Germany and Japan. Committee on Military Affairs, *supra* note 1, at 10. See also *supra* note 6 for discussion of the three types of cases that a military commission may try.

¹³⁸ In addition to the UCMJ requirement that military commissions follow the procedural requirements of the international law of war, the United States' ratification of international treaties that regulate the laws of war, such as the 1949 Geneva Conventions, binds the United States to the international procedural requirements for military commissions. See *infra* Part V.A.

Congress has also recognized military commissions in passing. The House Judiciary Committee made a statement in the legislative history of the War Crimes Act of 1996 that the Act "is not intended to affect in any way the jurisdiction of any courts-martial, military commission, or other military tribunal under any article of the Uniform Code of Military Justice or under the law of war or the law of nations." H.R. REP. NO. 104-698, at 12 (1996).

¹³⁹ Congress has only recognized military commissions without detailing the jurisdictional requirements. Committee on Military Affairs, *supra* note 1, at 9.

commissions permitted under the law of war.¹⁴⁰ Under the 1949 Geneva Conventions, military commissions have jurisdiction over persons who violate the laws of war while participating in armed conflict between contracting states.¹⁴¹ Persons who are not involved in such armed conflicts consequently are not subject to jurisdiction of the military commissions. Congress authorized use of force against those involved in the September 11 attacks.¹⁴² Congress specifically authorized use of force to fight terrorism, and the President has utilized this force in Afghanistan.¹⁴³ Therefore, a state of armed conflict existed when the President issued his November 13 Order. The laws of war consequently applied to the armed conflict in Afghanistan.¹⁴⁴ Al Qaeda, Osama bin Laden's terrorist organization, controlled, organized, financed, and trained manpower for the September 11 attacks.¹⁴⁵ Arguably, therefore, members of the al Qaeda organization are directly involved in the armed conflict regardless of whether they are in Afghanistan.¹⁴⁶

The broad language of President Bush's November 13 Order covers individuals who are not connected to the armed conflict in Afghanistan.¹⁴⁷ The

¹⁴⁰ *Id.* at 13 (noting that "classic 'offenders' subject to the law of war, including the Geneva Protocols," are enemy aliens and members of an armed body).

¹⁴¹ *Id.*

¹⁴² Committee on Military Affairs, *supra* note 1, at 4.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 3-4.

¹⁴⁶ *Id.* at 3.

¹⁴⁷ The November 13 Order covers any person who President Bush believes meets the following three requirements:

- (a) Is a non-citizen;
- (b) The United States has an interest in subjecting the person to the Order; and
- (c) One of the following:
 - (1) Is a member of al Qaeda; or
 - (2) Prepared, committed, aided, or conspired to commit acts of international terrorism and those acts caused, threatened to cause or aimed to cause injury or adverse effects on the United States citizens, national security, foreign policy, or economy; or
 - (3) Knowingly harbored one or more of the individuals described in (1) or (2).

November 13 Order, *supra* note 4, § 2(a)(1)(i)-(iii), at 57,834. One legal scholar has suggested that the non-citizen provision may be pivotal to the constitutionality of the November 13 Order, because historically the Supreme Court has held that non-citizens, particularly illegal aliens, have significantly reduced rights to constitutional freedoms and that enemy combatants have no constitutional rights. Sanford N. Caust-Ellenbogen, Professor of Law, Lecture on Federal Courts at The Ohio State University Moritz College of Law (Aug. 26, 2001). *But see infra* note 199 (quoting *Quirin* as stating the fact that enemy alien defendants did not foreclose judicial consideration of the constitutionality of their trial by military commission); *infra* note 247 (discussing that the Supreme Court has repeatedly recognized that all persons, whether a citizen or an alien, a civilian or in the military, deserve equal protection under the Constitution and the

November 13 Order's terms are in fact broad enough to cover any non-citizen who is in any way connected to past or present terrorist activities, not just terrorist activities connected to September 11 or al Qaeda.¹⁴⁸ Therefore, as written, President Bush's November 13 Order violates Congress's requirement that military commissions only have jurisdiction over persons that the laws of war permit.¹⁴⁹

2. Article 36 of the UCMJ

President Bush also cited in his November 13 Order Article 36 of the UCMJ, which is nearly identical to another provision in the Articles of War that President Roosevelt cited as a basis for his authority to create the Order.¹⁵⁰ Subject to only

law of war); *cf.* *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 682–83 (6th Cir. 2002) (noting that the First Amendment protects citizens' rights to know that their government is acting fairly in deportation of non-citizens and consequently prohibits the federal government from holding secret deportation hearings despite that the Bill of Rights does not protect non-citizens to the same extent it protects citizens).

Under the Geneva Conventions, the law of war only applies when there is a declared war or an armed conflict *between states*. Committee on Military Affairs, *supra* note 1, at 11. Al Qaeda is a terrorist organization based in Afghanistan; the organization itself does not represent a state under international law. *Id.* at 3, 13–14. *But see id.* at 13 (noting that some have argued that al Qaeda may have been controlling the Taliban government). This note suggests, however, that because Osama bin Laden, the leader of the al Qaeda organization that was behind the September 11 attacks, operated out of Afghanistan, all members of al Qaeda are directly connected to the September 11 attacks and to Afghanistan, and therefore the armed conflict. President Bush explained to Congress that although al Qaeda operates in at least sixty nations, including the United States, Afghanistan is al Qaeda's organizational base because Osama bin Laden, the organization's head, is in Afghanistan. Committee on Military Affairs, *supra* note 1, at 3 n.12. Bush contends that he initiated an armed conflict with Afghanistan not just because Afghanistan would not turn over leaders of al Qaeda, but also because that country was the organizational base of al Qaeda. *Id.*

¹⁴⁸ Critics have noted that the November 13 Order covers persons such as Northern Ireland leaders and Nelson Mandela. *See, e.g.*, Committee on Military Affairs, *supra* note 1, at 16. Representatives of the Bush Administration have stated, however, that the Administration does not interpret the language of the November 13 Order as broadly as the text allows. *See, e.g., infra* note 187.

¹⁴⁹ *See infra* note 158.

¹⁵⁰ November 13 Order, *supra* note 4; Military Order of July 2, 1942: Appointment of a Military Commission, 3 C.F.R. (1938–1943 Compilation) 1308 (1968). Article 36 of the UCMJ states:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

two restrictions, Article 36 allows a president to prescribe regulations for the procedure of military commissions.

First, the President must apply the principles of law and the rules of evidence generally required in criminal trials in United States federal courts “so far as he considers practicable.”¹⁵¹ President Bush stated in the findings section of his November 13 Order that international terrorism so endangered the safety of the United States that “it is not practicable” to apply the principles of law and the rules of evidence generally recognized in federal courts.¹⁵²

While Congress gave the President discretion under Article 36 to evaluate the circumstances and decide what procedure would be practical for military

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

10 U.S.C. § 836 (2000). Article 38 of the Articles of War states:

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually.

10 U.S.C. § 1509 (1946) (repealed 1950) (emphasis in original).

¹⁵¹ 10 U.S.C. § 836 (2000).

¹⁵² November 13 Order, *supra* note 4, § 1(f), at 57,833. This provision of the November 13 Order states in full:

Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Id.

Critics have questioned whether President Bush was correct in his judgment that the principles of law and the rules of evidence generally recognized in federal courts are not practicable in fighting the war on terrorism. *See, e.g.*, Committee on Military Affairs, *supra* note 1, at 18. Nevertheless, Article 36 seems to give the President great discretion in this decision. *Id.*

But critics point out that federal courts have successfully tried and convicted international terrorists, including al Qaeda members who bombed the World Trade Center in 1993. *Id.* at 40. In fact, the federal government has already obtained an indictment of bin Laden in the Federal District Court for the Southern District of New York. *Id.*

On the other hand, supporters of the November 13 Order have argued that military commissions are necessary to ensure convictions of terrorists that may not be obtainable in a federal criminal court. *See, e.g.*, *Terrorists on Trial—II*, WALL ST. J., Dec. 2, 2001, at A18 (“As recently as 1996, the Clinton Administration rejected Sudan’s offer to turn over Osama bin Laden because it didn’t think it had enough evidence to convict him in a criminal court. A military tribunal would certainly have come in handy then.”).

commissions, this discretion is not absolute. Article 36 places a second limitation on the President's ability to prescribe procedures. Any procedure the President prescribes, even if he finds the principles of law and rules of evidence not practicable, "may not be contrary to or inconsistent with this chapter."¹⁵³ Chapter 10 provides required procedures for the courts-martial, another form of military tribunal.¹⁵⁴ Under Article 36, then, the procedures of the President's military commission cannot be inconsistent with the procedures established for courts-martial.¹⁵⁵

The Code's requirement that military commission procedure cannot be "inconsistent" does not necessarily mean that the procedure for the military commission must be identical to the courts-martial procedure.¹⁵⁶ Rather, a strict textual interpretation of "may not be . . . inconsistent," indicates that the President's regulations must be in "agreement or harmony" with courts-martial regulations.¹⁵⁷ This note suggests, therefore, that the procedure of President Bush's military commissions may differ from courts-martial procedure so long as the military commission procedure is not incompatible with the essential elements of due process provided for in the UCMJ for courts-martial.

Military courts-martial do not afford defendants the same due process protections that civilian courts afford defendants, and consequently under U.S. law neither must President Bush's military commissions. Military courts-martial, like the November 13 Order, permit trial without a jury in a secure environment such as a naval vessel or military base.¹⁵⁸ Members of the military serve on

¹⁵³ 10 U.S.C. § 836 (2000); Committee on Military Affairs, *supra* note 1, at 18.

¹⁵⁴ As noted earlier, courts-martial usually hear cases in which members of the armed services violate their own military codes. *See supra* note 6. Under the UCMJ, however, courts-martial have concurrent jurisdiction with military commissions over "offenders and offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821 (2000).

¹⁵⁵ In *Quirin*, the Supreme Court expressly refused to decide whether a military commission trial must comply with the procedure Congress established for courts-martial. *Ex parte Quirin*, 317 U.S. 1, 46-47 (1942).

President Bush often cites precedent, but he has not yet noted that most military commissions established by the United States to try war criminals during and after the World War II adopted procedural rules that were similar to courts-martial procedure. Marmoa et al., *supra* note 6, at 74-75.

¹⁵⁶ If the procedure and regulations for courts-martial and military commissions had to be identical, courts-martial and military commissions would seem to be identical tribunals since, under the UCMJ, courts-martial and military commissions have concurrent jurisdiction. There must be some differences between the tribunals, or else there would be no need to refer to them with separate names.

¹⁵⁷ WEBSTER'S II NEW COLLEGE DICTIONARY 561 (2d ed. 1995).

¹⁵⁸ November 13 Order, *supra* note 4, § 4(c)(2), at 57,835 (stating that the military commission will sit "as the triers of both fact and law"); Committee on Military Affairs, *supra* note 1, at 41. The Constitution expressly states that members of the military are *not* subject to

courts-martial just as members of the military will presumably make up the military commissions.¹⁵⁹ The UCMJ, like the November 13 Order, even has provisions for presenting material in secret when necessary.¹⁶⁰

There are, however, essential due process protections that courts-martial still ensure.¹⁶¹ As written, Bush's November 13 Order is not in harmony with several of those essential due process protections.¹⁶² For example, the UCMJ does not permit the military to confine or arrest a person unless it has probable cause,¹⁶³

the Fifth Amendment right to a jury trial. *See* U.S. CONST. amend. V. That any trial by a courts-martial does not require a jury is significant, however, because jurisdiction of courts-martial is not limited to members of the military. Courts-martial also have concurrent jurisdiction over cases that military commissions have jurisdiction to try. *See* 10 U.S.C. § 821 (2000). Military commissions have jurisdiction to try any person who has violated the laws of war, whether civilian or military, national or foreign. *See supra* notes 55; *infra* note 222 and accompanying text.

¹⁵⁹ 10 U.S.C. §§ 825–826 (2000); November 13 Order, *supra* note 4, § 4, at 57,834–35. Under President Bush's November 13 Order, all defendants will be assigned a military attorney. Committee on Military Affairs, *supra* note 1, at 41. Under the Regulations, however, “[t]he Accused may also retain the services of a civilian attorney of the Accused’s own choosing and at no expense to the United States Government,” provided the attorney is a United States citizen; admitted to the bar in federal court, a state, district, territory, or possession of the United States; has not been sanctioned by any court, bar, or government authority; and is approved for access to “information classified at the level SECRET or higher,” and has signed a written agreement to comply with the applicable regulations and instructions for counsel. March Regulations, *supra* note 127, § 4(C)(3)(b).

¹⁶⁰ Committee on Military Affairs, *supra* note 1, at 41 n.101; November 13 Order, *supra* note 4, § 4(c)(4). An interesting point is that in courts-martial all of the attorneys must be of a rank that is cleared to see secret information. Committee on Military Affairs, *supra* note 1, at 41 n.101. The Department of Defense Regulations, in compliance with the 1949 Geneva Conventions, permit defendants to choose their own attorneys. March Regulations, *supra* note 127, § 4(C)(3). If the defendant chooses a civilian attorney, the defendant’s counsel may not have clearance to see all of the classified information. *See id.* § 4(C)(3) (stating that a civilian attorney need only be approved for “access to information classified at the level SECRET”); *id.* § 6(B)(3) (“A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person . . .”); *see also* Committee on Military Affairs, *supra* note 1, at 41 n.101. The November 13 Order itself specifically states that “[n]othing in this order shall be construed to . . . authorize the disclosure of state secrets to any person not otherwise authorized to have access to them . . .” November 13 Order, *supra* note 4, § 7(a)(1).

¹⁶¹ Committee on Military Affairs, *supra* note 1, at 41.

¹⁶² *See DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Before the S. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Senator Patrick Leahy, Chairman, S. Comm. on the Judiciary) (Dec. 6, 2001), http://judiciary.senate.gov/member_statement.cfm?id=121&wit_id=50 (last visited Oct. 21, 2001) (noting that “as written, the President’s order outlines a process that is far different than our military system of justice”).

¹⁶³ 10 U.S.C. § 809(d) (2000). At trial those who have signed the charges against defendants must take an oath that they have personal knowledge of or have investigated the

and an accuser must conduct a "thorough and impartial investigation" of the charges before a court-martial will consider charges.¹⁶⁴ The November 13 Order, on the other hand, allows President Bush to detain or try a person under military commission if he determines "from time to time" that the person meets the requirements of the Order.¹⁶⁵

When the military arrests or confines anyone prior to trial, the UCMJ requires that it immediately inform those confined of what specific wrong they are accused and take immediate steps to try them or dismiss the charges and release them.¹⁶⁶ The November 13 Order as written allows the Administration to detain persons indefinitely without charges, trial, or the right to seek remedy in federal or state courts.¹⁶⁷ A court-martial cannot try a person accused of an offense if five years have passed since the person allegedly committed the offense.¹⁶⁸ A military commission may, on the other hand, try any person who has ever met the description of a person subject to the November 13 Order without a statute of limitations.¹⁶⁹

If a court-martial convenes to try an individual, the accused has the right under the UCMJ to choose his or her own defense counsel.¹⁷⁰ However, the November 13 Order does not provide for the defendant's right to select his or her own attorney.¹⁷¹ A court-martial cannot convict a person of an offense subject to the death penalty, or sentence a person to the death penalty without a unanimous

matters set forth in the charge, and that everything stated in the charge is true to the best of their knowledge or belief. 10 U.S.C. § 830(a) (2000).

¹⁶⁴ 10 U.S.C. § 832(a) (2000).

¹⁶⁵ November 13 Order, *supra* note 4, § 2(a), at 57,834. The November 13 Order does not require that the President conduct any investigation, let alone a "thorough and impartial investigation," before he deems a person subject to the Order. *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Committee on Military Affairs, *supra* note 1, at 19. The November 13 Order only states that when persons are detained they must be treated humanely, allowed free exercise of religion, and adhere to the Secretary of Defense's rules. November 13 Order, *supra* note 4, § 3, at 57,834. The November 13 Order allows the Administration to detain persons inside or outside the United States. *Id.*

¹⁶⁸ 10 U.S.C. § 843(b)(1) (2000). Section 843(b)(1), the statute of limitation section, states in full:

Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

Id.

¹⁶⁹ See November 13 Order, *supra* note 4, § 2, at 57,834.

¹⁷⁰ 10 U.S.C. § 827(a)(2) (2000).

¹⁷¹ See November 13 Order, *supra* note 4, § 4(c)(5), at 57,835, for the defendant's right to an attorney.

vote of all members of the court-martial present.¹⁷² Under the November 13 Order as written, however, a military commission may convict for a crime subject to the death penalty and sentence a person to death with a vote of only two-thirds of the members present.¹⁷³ Persons accused have the right to appeal and the right to a public trial when possible.¹⁷⁴ The November 13 Order prohibits both the right to appeal¹⁷⁵ and the right to a public trial.¹⁷⁶ The UCMJ also gives defendants several rights during trial that the November 13 Order does not provide for, but which the Order also does not expressly prohibit. For example, under the UCMJ the accused also has a right to be free from self-incrimination,¹⁷⁷ to have an impartial trial,¹⁷⁸ and to have an equal opportunity to obtain witnesses and other evidence.¹⁷⁹

The Bush Administration has represented to the public that the military commissions will provide the same protections as the well-respected United States' military justice system, or courts-martial.¹⁸⁰ As demonstrated above,

¹⁷² 10 U.S.C. § 852(a)(1) (2000). Life sentences require a three-fourths vote. *Id.* § 852(b)(2). All other convictions and sentences require a two-thirds vote. *Id.* § 852(a)(2), (b)(3). Interestingly, when President Roosevelt established his military commission to try the eight Nazi saboteurs, courts-martial required concurrence of only two-thirds of the members of the court present. *Marmoa et al.*, *supra* note 6, at 75.

¹⁷³ November 13 Order, *supra* note 4, §§ 4(a), 4(c)(6), 4(c)(7), at 57,834–35.

¹⁷⁴ Committee on Military Affairs, *supra* note 1, at 2, 41. Additionally, the UCMJ requires that both courts-martial and military commissions have a court reporter record the proceedings and testimony before the commission. 10 U.S.C. § 828 (2000). The UCMJ does not state, however, that the record must be made public. *Id.*

¹⁷⁵ November 13 Order, *supra* note 4, § 7(b), at 57,835–36.

¹⁷⁶ *Id.* § 4(c)(4), at 57,835.

¹⁷⁷ 10 U.S.C. § 831(a) (2000).

¹⁷⁸ 10 U.S.C. § 837 (2000). One of the main criticisms of President Bush's November 13 Order and the Regulations is that the military commissions they provide for will not be impartial because the commission members sit at the President's pleasure. *See, e.g.*, Tribe, *supra* note 8 (noting that the President as chief executive would control every aspect of the military commissions, from appointments to sentencing); Martin, *supra* note 8; Memorandum, Interested Persons Memorandum Regarding the "Military Commission Order No. 1," Timothy H. Edgar, ACLU Legislative Counsel, at <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=10150&c=111> (Apr. 16, 2002) (noting that "[t]he procedures outlined by Military Commission Order No. 1 utterly fail to provide for an impartial and independent tribunal"). The UCMJ addresses impartiality under § 837. 10 U.S.C. § 837 (2000). The UCMJ specifically states that no authority convening a courts-martial, which could include the President, Secretary of State, or commanding officer, may censure or reprimand any member of the proceeding because of the outcome. *Id.* The UCMJ does not speak to the inherent influence a member of the military has from its commanding officers. *Id.*

¹⁷⁹ 10 U.S.C. § 846 (2000).

¹⁸⁰ *See, e.g.*, Gonzales, *supra* note 95. Some critics have argued, however, that in actuality the Bush Administration has misrepresented to the public that under the November 13

several aspects of the November 13 Order's outlined procedures are inconsistent with the essential elements of due process Congress expressly required under the UCMJ.¹⁸¹ However, the Secretary of Defense's rules indicate that the Bush Administration plans to comply with the UCMJ required courts-martial procedure because the Regulations largely adhere to the UCMJ minimum requirements.¹⁸²

Regardless of how close the Regulations come to harmonizing the Military

Order the military commission's procedure will comply with court-martial procedure. *See, e.g.*, 147 CONG. REC. S13,276 (daily ed. Dec. 14, 2001) (statement of Senator Lugar) ("[T]he White House counsel has explained that military commissions will be conducted like courts-martial under the Uniform Code of Military Justice."); William Glaberson, *Tribunal v. Court-Martial: Matter of Perception*, N.Y. TIMES, Dec. 2, 2001, at 1B6. Mr. Gonzales, legal counsel for the White House, misrepresented several other aspects of the military commissions provided for in the November 13 Order. Gonzales, *supra* note 95. For example, he claimed only "active supporters of al Qaeda or other international terrorist organizations targeting the United States" would be subject to the commissions, when in reality the scope of the November 13 Order covers any suspected terrorist, whether or not a member of an organization targeting the United States, as well as persons who in any way aid or harbor such suspected terrorists. *Id.*; November 13 Order, *supra* note 4, § 2, at 57,834. Additionally, Mr. Gonzales claimed that the military commission trials would *not* be secret; that "the [O]rder preserves judicial review;" and that the Order does not suspend the privilege of habeas corpus. Gonzales, *supra* note 95.

¹⁸¹ Committee on Military Affairs, *supra* note 1, at 18, 41. Under the UCMJ, Congress does not require that military commissions have procedures consistent with courts-martial procedures; nor is there any good reason not to follow the courts-martial procedure. *Infra* note 211. The minimum due process requirements of the courts-martial procedure will not hinder the efficiency and ability to protect classified information that President Bush insists are essential characteristics of military commissions. *Id.* For example, courts-martial allow for the secrecy and speed that President Bush claims is necessary to try suspected terrorists. *Id.*

¹⁸² For example, the regulations provide that a defendant has the right to choose a defense counsel. March Regulations, *supra* note 127, § 4(C)(3)(b). *Cf. supra* note 160 (noting that civilian lawyers may not have access to all secret information). Under the regulations, a unanimous verdict from seven-member commissions will be required for any death sentence. March Regulations, *supra* note 127, § 6(F). The regulations provide for a review of verdicts and sentences by appeal to a three-member review panel. *Id.* § 6(H)(4). Additionally, the regulation provides that the accused will be afforded a public trial where possible. *Id.* § 5(O). Finally, the regulation gives defendants the right to be free from self-incrimination, to have an impartial trial, and to have an equal opportunity to obtain witnesses and other evidence. *Id.* §§ 5(E), 5(F), 5(H), 6(B)(2).

The regulation does not, however, resolve all discrepancies between the November 13 Order and the UCMJ minimum due process requirements. For example, the regulation does not require probable cause to confine or arrest a person subject to the Order. March Regulations, *supra* note 127. Additionally, nothing in the regulation prevents a person from being confined indefinitely without trial. *Id.* Finally, there are still questions of impartiality and independence of the commissions, since under the regulations the "Appointing Authority," which may be the President, the Secretary of Defense, or a designee, will have ultimate control over the entire military commission proceeding, including the appointing of commissioners, the review panel, the selection of the Chief Prosecutor and Chief Defense Counsel, and the ultimate decision in the case. *Id.* §§ 2, 4, 6(H).

Tribunal Procedures with the UCMJ minimum requirements, and despite the presumption that the Supreme Court may find that the Defense Department's Regulations adhere to the UCMJ minimum due process requirements,¹⁸³ this note suggests that those rights subject to the November 13 Order will not be protected until the Order itself is in harmony with the essential due process protections provided for under courts-martial. Although the Bush Administration has declared its intention to adhere to the UCMJ minimum due process requirements,¹⁸⁴ critics have argued that the Bush Administration's "trust us" position is not good enough to protect the American people from erosion of the Constitution.¹⁸⁵ According to these critics, Congress should limit the November 13 Order by statute to prevent establishing a precedent that the text of the Order as written is constitutional.

This note agrees that the November 13 Order cannot stand as written. Even if the Bush Administration can be trusted not to infringe on its promise that persons subject to the November 13 Order will have minimum due process rights, future Administrations may not be so trustworthy. President Bush's November 13 Order is itself an example of how future presidents may expand precedent; President Bush has used President Roosevelt's military commission as justification for his own military order, despite significant differences in procedure and circumstances.¹⁸⁶ If Congress allows the November 13 Order to stand as written, it has set a precedent for future presidents to use military commissions in broader ways.¹⁸⁷

¹⁸³ See *supra* note 66–68 and accompanying text (discussing the *Quirin* Court's finding that although Roosevelt's Order expressly suspended the Writ of Habeas Corpus, the Court interpreted the Order to allow Habeas Corpus). But see *supra* note 31 (noting distinctions between Presidents Bush and Roosevelt's orders that may lead the Supreme Court to distinguish *Quirin*).

¹⁸⁴ See *supra* note 180 and accompanying text.

¹⁸⁵ Elizabeth Olson, *World Briefing United Nations: Rights Official Criticizes U.S. Tribunal Plan*, N.Y. TIMES, Dec. 8, 2001, at A6 (noting United Nations Human Rights Commissioner Mary Robinson's criticism of the Bush Administration's commission for infringing democratic rights, stating that it was "not enough to say trust me as a government"); see, e.g., Robin Toner, *Senators Spar Carefully in Hearing on Security*, N.Y. TIMES, Dec. 7, 2001, at B7 (noting that Senator Edward M. Kennedy argued that Bush's order allowing for military commissions had "enormous potential for abuse").

¹⁸⁶ See *supra* notes 95, 155.

¹⁸⁷ See, e.g., Katyal, *supra* note 106. The regulations seem to leave the door open to application in line with the November 13 Order, rather than the more limiting Regulations. The regulations specifically state:

In the event of any inconsistency between the President's Military Order and this Order, including any supplementary regulations or instructions issued [by the Appointing Authority], the provisions of the President's Military Order shall govern. In the event of any inconsistency between this Order and any regulations or instructions issued [by the Appointing Authority], the provisions of this Order shall

3. Section 412 of the Patriot Act

Congress adopted the Patriot Act¹⁸⁸ on October 26, 2001, to give the federal government the law enforcement and intelligence-gathering tools necessary to

govern.

March Regulations, *supra* note 127, § 7(B). Additionally, the regulation explicitly states that “[n]o provision in this Order shall be construed to be a requirement of the United States Constitution.” *Id.* § 10. Consequently, the Secretary of Defense has stated that he can remove any of the provisions of the Regulation at any time without violating the Constitution.

¹⁸⁸ USA Patriot Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272 (codified at 8 U.S.C.A. § 1226a (West Supp. 2002)). Section 412 states in pertinent part:

Sec. 412. Mandatory Detention of Suspected Terrorists; Habeas Corpus; Judicial Review.

- (a) IN GENERAL.—The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended by inserting after section 236 the following:

....

“SEC. 236A. (a) DETENTION OF TERRORIST ALIENS.—

“(1) CUSTODY.—The Attorney General shall take into custody any alien who is certified under paragraph (3).

“(2) RELEASE.—Except as provided in paragraphs (5) and (6), the Attorney General shall maintain custody of such an alien until the alien is removed from the United States. Except as provided in paragraph (6), such custody shall be maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified under paragraph (3). If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate.

“(3) CERTIFICATION.—The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien—

- (A) is described in section 212(a)(3)(A)(i), 212(a)(3)(A)(iii), 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), or 237(a)(4)(B); or
- (B) is engaged in any other activity that endangers the national security of the United States.

....

“(5) COMMENCEMENT OF PROCEEDINGS.—The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.

“(6) LIMITATION ON INDEFINITE DETENTION.—An alien detained solely under paragraph (1) who has not been removed under section

fight the war on terrorism.¹⁸⁹ Section 412¹⁹⁰ of the Act provides that when the federal government detains aliens subject to the Act, it must criminally charge

241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

“(7) REVIEW OF CERTIFICATION.—The Attorney General shall review the certification made under paragraph (3) every 6 months. If the Attorney General determines, in the Attorney General’s discretion, that the certification should be revoked, the alien may be released on such conditions as the Attorney General deems appropriate, unless such release is otherwise prohibited by law. The alien may request each 6 months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request.

(b) HABEAS CORPUS AND JUDICIAL REVIEW.—

(1) IN GENERAL.—Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6)) is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.

“(2) APPLICATION.—

“(A) IN GENERAL.—Notwithstanding any other provision of law, including section 2241(a) of title 28, United States Code, habeas corpus proceedings described in paragraph (1) may be initiated only by an application filed with—

“(i) the Supreme Court;

“(ii) any justice of the Supreme Court;

“(iii) any district court otherwise having jurisdiction to entertain it.

....

“(3) APPEALS.—Notwithstanding any other provision of law, including section 2253 of title 28, in habeas corpus proceedings described in paragraph (1) before a circuit or district judge, the final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia Circuit. There shall be no right of appeal in such proceedings to any other circuit court of appeals.

“(4) RULE OF DECISION.—The law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision in habeas corpus proceedings described in paragraph (1).

Id.

¹⁸⁹ See Committee on Military Affairs, *supra* note 1, at 23.

¹⁹⁰ Section 412 is titled, “Mandatory Detention of Suspected Terrorists; Habeas Corpus;

them, or begin removal proceedings, within seven days of detention.¹⁹¹ If release of the alien would endanger the national security of the United States, then the Attorney General may continue the detention.¹⁹² To continue detaining the alien, the Attorney General must recertify every six months that releasing the alien would endanger national security.¹⁹³

In section 412 Congress specifically gives aliens the right to habeas corpus review of the federal government's decision to detain them.¹⁹⁴ The alien may submit an application for habeas corpus review to the Supreme Court, any Justice of the Supreme Court, any circuit judge of the D.C. Circuit Court of Appeals, or any district court with jurisdiction.¹⁹⁵ Additionally, Congress gives aliens the right to appeal district court decisions to the D.C. Circuit Court of Appeals.¹⁹⁶

President Bush's November 13 Order on its face deprives aliens of the right to the privilege of habeas corpus and the right to appeal,¹⁹⁷ thereby contradicting section 412 of the Patriot Act.¹⁹⁸ The Administration has stated, however, that President Bush did not intend the November 13 Order to suspend habeas corpus

Judicial Review." 8 U.S.C.A. § 1226a (West Supp. 2002)

¹⁹¹ See *id.* § 1226a(a)(5). Foreign states have already begun to criticize the United States for failing to notify states when their citizens are detained under the Patriot Act. See, e.g., Sanger, *supra* note 96 (noting that Egyptian Foreign Minister Ahmed Maher has complained to Secretary of State Colin L. Powell that the United States has not given Egypt the names of Egyptian citizens arrested or detained). The United States has an obligation under the Vienna Convention on Consular Relations to give foreign citizens the absolute right to consular and diplomatic assistance from their state. See *LeGrand Case (Germany v. U.S.)*, 2001 I.C.J. 104 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_jjudgment_20010625.htm.

¹⁹² 8 U.S.C. § 1226a(a)(6) (West Supp. 2002).

¹⁹³ *Id.* § 1226a(a)(7).

¹⁹⁴ *Id.* § 1226a(b)(1).

¹⁹⁵ *Id.* § 1226a(b)(2)(A).

¹⁹⁶ *Id.* § 1226a(b)(3).

¹⁹⁷ The November 13 Order authorizes the President to create military commissions to try persons subject to the Order. November 13 Order, *supra* note 4, § 7(b), at 57,835–36. Military commissions created under the November 13 Order have exclusive jurisdiction over persons subject to the Order. *Id.* § 7(b)(1), at 57,835. Any person subject to the Order, whether tried or simply detained, is not permitted to seek “any remedy” or “maintain any proceeding” in any United States federal or state court, any foreign court, or any international tribunal. *Id.* § 7(b)(2), at 57,835–36. Critics have argued that this broad prohibition on any proceeding or remedy denies the detainees the privilege of the writ of habeas corpus. See, e.g., Committee on Military Affairs, *supra* note 1, at 23; see also *supra* note 129.

¹⁹⁸ 8 U.S.C.A. § 1226a(b) (West Supp. 2002). Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, questioned why the Bush Administration both requested that Congress pass the Patriot Act as quickly as possible and then, without prior notice to Congress, issued the November 13 Order that contradicts the Act. Committee on Military Affairs, *supra* note 1, at 23 n.63 (citing Senator Leahy's comments on *Meet the Press* (NBC television broadcast, Nov. 25, 2001)).

and he has no intention of denying detained persons the privilege of habeas corpus.¹⁹⁹ The March Regulations do not mention the privilege of habeas corpus.²⁰⁰

¹⁹⁹ Committee on Military Affairs, *supra* note 1, at 25. The Bush Administration has gone so far as to state that the November 13 Order as written does not deny persons subject to the Order the writ of habeas corpus. See, e.g., Gonzales, *supra* note 95 (President Bush's counsel noting that persons tried under military commissions have the right to file a habeas corpus petition). The Administration has also noted that the *Quirin* Court, which examined nearly identical provisions in President Roosevelt's Order that seemed to suspend habeas corpus, found the provision constitutional:

Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in federal court. The language of the order is similar to the language of a military tribunal order issued by President Franklin Roosevelt that was construed by the Supreme Court to permit habeas corpus review.

Gonzales, *supra* note 95.

On its face, President Roosevelt's Order suspended the writ of habeas corpus for all purposes. President Roosevelt issued a Proclamation and a Military Order on July 2, 1942. Proclamation No. 2561: Denying Certain Enemies Access to the Courts of the United States, 3 C.F.R. (1938–1943 Compilation) 309 (1968), *reprinted in*, 56 Stat. 964 (1942); Exec. Order No. 9185, 3 C.F.R. (1938–1943 Compilation) 1171 (1968). In the Proclamation, Roosevelt denied citizens and residents of nations at war with the United States access to courts of the United States if they entered or tried to enter the United States to commit hostile or warlike acts. *Id.* In the same Proclamation, Roosevelt stated that such persons would “be subject to the law of war and to the jurisdiction of military tribunals.” *Id.* Nevertheless, the Court did not strike down the Order as unconstitutional or require the Order to be amended. Under the Military Order, Roosevelt appointed a military commission to try the Nazi saboteurs under the law of war and the Articles of War. Military Order of July 2, 1942: Appointment of a Military Commission, 3 C.F.R. (1938–1943 Compilation) 1308 (1968). Nevertheless, when the Court reviewed the saboteurs' writs of habeas corpus, it reviewed the validity of the Proclamation and the Order establishing the military commission as if they were one. *Ex parte Quirin*, 317 U.S. 1, 22–23 (1942). The Court simply limited the Order by interpretation. *Id.* at 24–25. The *Quirin* Court stated:

[T]here is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.

Id. at 25. Similarly, President Bush's November 13 Order as written suspends the right of habeas corpus for all purposes. See *supra* note 197. Therefore, if the Supreme Court adheres to the *Quirin* precedent, it will uphold a defendant's right to file a habeas corpus petition to challenge a military commission's jurisdiction, but it will not declare the November 13 Order unconstitutional on its face. Such a holding seems less likely in light of the Regulations, which do not protect a defendant's right to habeas corpus under the November 13 Order. See March Regulations, *supra* note 127 and accompanying text. See also *supra* notes 183–87 and accompanying text (arguing that the safeguarding of minimum due process requirements

V. THE NEED TO THINK GLOBALLY

Even if President Bush's November 13 Order is constitutional,²⁰¹ the Bush Administration must look beyond the United States Constitution to succeed in the "worldwide campaign" against terrorism.²⁰² There are two fundamental reasons that this note recommends that the United States adhere to international law when conducting trials in the war against terrorism. First, the United States is bound by international law, both under the Constitution and as a state in the international system.²⁰³ If the Bush Administration chooses to violate the treaties and customary international law that bind the United States, the United States will be subject to enforcement abroad. Second, complying with international law is good policy. Because the war on terrorism is a worldwide campaign, the United States cannot win the war without international assistance. If the Bush Administration refuses to comply with international law, it will alienate the very countries that the United States needs as allies. Refusing to comply with international law will also undermine principles of order and stability that benefit the United States.

A. *International Law Binds the United States*

The November 13 Order, when interpreted in light of the Secretary of Defense's limiting regulations,²⁰⁴ is most likely constitutional.²⁰⁵ The Constitution, however, is not the only law that President Bush's military

should not be left to speculated Supreme Court interpretation).

On the other hand, there is evidence that the Bush Administration did intend to suspend the writ of habeas corpus for persons subject to the November 13 Order. *See* Committee on Military Affairs, *supra* note 1, at 25 n.68. The Bush Administration seems to have issued the November 13 Order to achieve the full range of powers that it originally sought in the Patriot Act but for which it could not secure Congressional approval. *Id.* at 23 n.64 (noting that Attorney General Ashcroft originally attempted to get Congress to suspend habeas corpus in the Patriot Act).

²⁰⁰ *See* March Regulations, *supra* note 127.

²⁰¹ *See supra* note 128 (discussing whether the Supreme Court will hear a jurisdictional challenge of Bush's military commission).

²⁰² President Bush and President Megawati of Indonesia, President Building a Worldwide Campaign Against Terrorism, Remarks at a Photo Opportunity, at <http://www.whitehouse.gov/news/releases/2001/09/20010919-1.html> (Sept. 19, 2001). Approximately one week after the attacks, President Bush promised that "there will be a campaign against terrorist activity, a worldwide campaign. And there is an outpouring of support for such a campaign." *Id.* After November 13, however, foreign states are becoming more cautious in that support. *See, e.g., infra* notes 218, 242.

²⁰³ *See infra* Part V.A.

²⁰⁴ *See supra* Part IV.

²⁰⁵ *See supra* Part IV.

commissions must be judged against.²⁰⁶ The Constitution states that treaties are the supreme law of the land, and the Supreme Court held in *The Paquete Habana*²⁰⁷ that international law is part of the law of the United States.²⁰⁸ Under *Paquete Habana*, international law, not national law, is controlling because President Bush's November 13 Order implicates international borders.²⁰⁹

Not only is international law generally a part of U.S. law, but President Bush's November 13 Order explicitly states that the military commission will try persons subject to the Order under the law of war,²¹⁰ which is governed by international law.²¹¹ Additionally, the UCMJ sections that President Bush cited as sources of his authority to establish military commissions state that military

²⁰⁶ See, e.g., *supra* note 79 and accompanying text (discussing the fact that the Congress defined the laws of war in terms of international law).

²⁰⁷ 175 U.S. 677 (1900).

²⁰⁸ *Id.* at 700 (holding that international law is part of customary U.S. law). President Roosevelt recognized that the President cannot violate an express prohibition by Congress. See *supra* note 54. When Congress ratified the 1949 Geneva Conventions, it in effect prohibited the President from violating the jurisdictional and minimal procedural requirements for military commissions established by the Conventions. See Committee on Military Affairs, *supra* note 1, at 30–31.

Additionally, the UCMJ states that military commissions have jurisdiction over “offenders or offenses that by statute or by the law of war may be tried by military commissions . . . or other military tribunals.” 10 U.S.C. § 821 (2000). Because Congress has not expressly passed a statute establishing a military commission, under the UCMJ military commissions have jurisdiction only when the law of war gives military commissions jurisdiction. *Id.*; see *supra* Part IV.B.1.

U.S. courts recognize that international law, both customary and treaty, is just as much a part of federal law as Congressional statutes. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 209–11 (2d ed. 1996). Consequently, if a statute is passed after a treaty, that statute supersedes the treaty just as a later statute supersedes an earlier. See *id.* This is known as the “later in time” doctrine. Mary Ellen O’Connell, Lecture on International Dispute Resolution at The Ohio State University Moritz College of Law (Nov. 28, 2001). Under the “later in time” doctrine, if Congress passes legislation permitting military commissions to violate international law, that legislation would trump both customary international law and treaties. *Id.* The United States would still be subject under international law, however, to reparations for violating ratified conventions and treaties. *Id.*

²⁰⁹ See *Paquete Habana*, 175 U.S. at 700. The November 13 Order implicates international borders. For example, certain provisions require that state citizens of foreign states are subject to the Order. See November 13 Order, *supra* note 4, § 2(a), at 57,834. Additionally, the November 13 Order states that the military commissions may be held anywhere around the globe. *Id.* § 4(c)(1), at 57,835.

²¹⁰ See November 13 Order, *supra* note 4, § 1(e), at 57,833 (noting that persons subject to the Order will be “tried for violations of the laws of war and other applicable laws by military tribunals”). As noted earlier, there is a question as to whether the November 13 Order is limited to international law, given that “other applicable laws” may include national law. See *supra* note 106 and accompanying text.

²¹¹ Marmoa et al., *supra* note 6, at 44.

commissions have jurisdiction over persons whom a statute or the laws of war subject to the jurisdiction of military commissions.²¹² Congress has not passed a statute defining the jurisdiction of military commissions.²¹³ Military commissions, therefore, only have jurisdiction over persons and offenses that the law of war allows.²¹⁴ President Bush must, by his own express assertion, comply with the international law of war when establishing military commissions.²¹⁵

Despite President Bush's express assertion, the Bush Administration has expressed a general unwillingness to comply with international treaties when those treaties would limit the Administration's ability to fight the war on terrorism in whatever form the Administration thought best.²¹⁶ President Bush went so far as to say in January 2002 that he would not apply the 1949 Geneva

²¹² The *Quirin* Court expressly stated that it did not define the limits of the jurisdiction of military courts to try persons according to the law of war. *Ex parte Quirin*, 317 U.S. 1, 45–46 (1942) (“We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war.”).

Nevertheless, the Court emphasized that the defendants were charged with violations clearly within the scope of “unlawful belligerents” under the law of war. Roosevelt’s proclamation limited access to federal courts for foreign citizens or residents:

[W]ho during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States . . . except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

Proclamation No. 2561: Denying Certain Enemies Access to the Courts of the United States, 3 C.F.R. (1938–1943 Compilation) 309 (1968), *reprinted in*, 56 Stat. 1964 (1942). Roosevelt’s Proclamation was also reprinted under Article 82 of the Articles of War, which is entitled “Spies.” 10 U.S.C. § 1554 (1946) (repealed 1950).

The Court noted that under the Articles of War, military commissions had jurisdiction over persons whom a statute or the laws of war subjected to military commissions. *See Quirin*, 317 U.S. at 25, 36, 48.

²¹³ *See supra* note 139 and accompanying text.

²¹⁴ *Id.*

²¹⁵ Additionally, the U.S. Armed Forces specifically required in the Department of Defense’s Law of War Program that the Federal Government comply with international laws of armed conflict. U.S. Dep’t of Def., Department of Defense Directive Number 5100.77: DoD Law of War Program (Dec. 9, 1998), http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf (last visited Oct. 21, 2002); Committee on Military Affairs, *supra* note 1, at 31.

²¹⁶ *See* Thom Shanker & Katharine Q. Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12.

Conventions—"the world's most revered" treaties—to the war in Afghanistan.²¹⁷ After severe criticism from the international community and the State Department,²¹⁸ President Bush agreed to apply the sections of the 1949 Geneva Conventions pertaining to prisoners.

The United States has ratified the 1949 Geneva Conventions and is therefore bound by its rules. President Bush still insists, however, that he will not apply the Conventions to the Taliban or al Qaeda.²¹⁹ Even if a war on terrorism does not fit neatly into the current international laws of war, President Bush does not have the authority to amend international law unilaterally. Until the international community revises the laws of war, the 1949 Geneva Conventions articulate the law of war that President Bush must follow.²²⁰ Until then, President Bush must comply with the scope both of permissible jurisdiction and of permissible procedure that the 1949 Geneva Conventions articulated.²²¹

²¹⁷ *Id.*

²¹⁸ *Id.* France and Britain warned the United States that they likely would not extradite Taliban and al Qaeda fighters captured by their troops in Afghanistan unless President Bush promised to honor the 1949 Geneva Conventions. *Id.* Secretary of State Colin L. Powell and the Joint Chiefs of Staff warned the President that ignoring the Geneva Conventions would put American troops at risk if and when they were captured abroad. *Id.*

²¹⁹ *Id.*

²²⁰ See Major Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 5, 20 (1984).

The common Article 1 of each of the 1949 Geneva Conventions states, "Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." *Id.* at 25. Common Article 2 states that "no state bound by the Conventions can assert any valid reason for not respecting their terms." *Id.* at 26. The Conventions explicitly require that "[u]pon ratifying or acceding to the Conventions, individual states clearly assume affirmative obligations to . . . insure their detailed execution in the armed forces through their commanders-in-chief . . ." *Id.* at 41. As Major Murphy summarizes, "[i]n short, application of the Conventions is not dependent upon any specific characterization of a conflict." *Id.* Consequently, Bush must comply with the Conventions even in this "new war" on terrorism, "both at home and abroad." See *id.* at 25. But see Aldrich, *supra* note 116, at 765–66 (noting that the Geneva Conventions are not enforced). Note, though, that Aldrich only discusses the lack of enforcement of the 1949 Geneva Conventions in the context of states refusing to accept protecting powers during or after an armed conflict. *Id.* Additionally, Aldrich notes that the 1977 Protocols were created to ensure better compliance of the 1949 Geneva Conventions. *Id.* at 766–67. See also Murphy, *supra*, at 65–67.

The Geneva Conventions do not cover all war crimes, though all war crimes are subject to universal jurisdiction. *Id.* at 43. The Conventions do articulate several war crimes that are also "grave breaches." *Id.* at 61. The Conventions only mandate and provide jurisdiction over trial for grave breaches. *Id.* Consequently, states have the discretion to enforce the customary law of war when persons breach war crimes that are not designated as grave breaches under the Conventions but that still violate the Conventions. *Id.*

²²¹ *Id.* at 19–20; *supra* notes 138–46 and accompanying text. Nearly every state has signed and ratified the 1949 Geneva Conventions, including both the United States and

1. *Jurisdictional Limits of the 1949 Geneva Conventions*

The 1949 Geneva Conventions state that the law of war applies to persons involved in or affected by either a declared war or an armed conflict between states.²²² The United States has waged a “war on terrorism,” but the laws of war

Afghanistan. Human Rights Watch, *Legal Issues Arising from the War in Afghanistan and Related Anti-Terrorism Efforts*, at <http://www.hrw.org/campaigns/september11/ihlqna.htm> (last visited Oct. 20, 2002); see also Murphy, *supra* note 220, at 4–5. The general terms of the 1949 Geneva Convention apply “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” *Id.* at 20. Under the Geneva Conventions, “armed conflict . . . encompasses any difference arising between two states which leads to the intervention of armed forces or their equivalent.” *Id.* at 21; see also Committee on Military Affairs, *supra* note 1, at 11; *supra* note 140–41 and accompanying text. Since the 1949 Geneva Conventions are so widely accepted, the provisions of the Conventions have become customary international law. Murphy, *supra* note 220, at 21. Consequently, States are bound by the Conventions whether or not they have ratified them. *Id.* at 22.

Some critics assert that a war on terrorism does not qualify for coverage under the 1949 Geneva Conventions because the United States is not fighting any one “state.” See *supra* notes 142–46 and accompanying text for the suggestion that all members of al Qaeda are sufficiently connected to the armed conflict in Afghanistan to be subject to military commissions under the 1949 Geneva Conventions. Because the 1949 Geneva Conventions are customary international law, this note takes the position that the provisions of the Conventions define “law of war,” that the UCMJ and Bush Administration state as defining the jurisdiction of military commissions. See *supra* notes 138–41. Consequently, the rules of the 1949 Geneva Conventions regulate military commissions even in the “new” and “amorphous” war against terrorism, which according to the Bush Administration is not a war against any one state. See generally Murphy, *supra* note 220, at 12–17 (chronicling the historical development of the customary international law of war).

²²² Committee on Military Affairs, *supra* note 1, at 11 (discussing Common Article 2 of the Geneva Conventions); Murphy, *supra* note 220, at 20, 22–26. Specifically, the First Convention protects wounded or sick combatants, or members of the armed forces or persons of hostile, organized resistance movements in an occupied territory, of any party to the conflict. Murphy, *supra* note 220, at 23; Marmoa et al., *supra* note 6, at 47. The Second Convention protects wounded or sick combatants aboard ships or aircraft and combatants who are shipwrecked by or from ships or aircraft. Murphy, *supra* note 220, at 23. The Third Convention protects prisoners of war or combatants who fall into the power of the enemy. *Id.* at 24. The Fourth Convention protects civilians or noncombatants—persons who are not members of the armed forces and do not participate in any military operations. *Id.*

Richard Dicker, Director of the International Justice Program, has noted that the U.N. tribunals, which abide by the international law of war, were able to successfully prosecute “some of the worst war criminals in the world,” even under the high judicial standards of international law. Human Rights Watch, *U.S.: Military Commissions Can’t Compare to International Courts: Due Process Standards are Much Lower for Proposed U.S. Trials*, HUMAN RIGHTS NEWS, at <http://www.hrw.org/press/2001/12/MilTribunal1204.htm> (Dec. 4, 2001).

only apply to those connected with the armed conflict.²²³

Officials of the Bush Administration have argued that the war against terrorism is a “new kind of war” where the enemy is amorphous rather than any particular state.²²⁴ Although the U.S. armed conflict is directed against Afghanistan and al Qaeda, the latter of which was directly involved in the September 11 attacks, the November 13 Order subjects persons to military commissions who are not directly connected to the armed conflict in Afghanistan or the terrorist attacks of September 11.²²⁵

2. *Procedural Requirements of the 1949 Geneva Conventions*

President Bush insists that “we must not let foreign enemies use the forums of liberty to destroy liberty itself. Foreign terrorists and agents must never again be allowed to use our freedoms against us.”²²⁶ What President Bush must appreciate, however, is that even if the Constitution permits him to suspend constitutional freedoms when trying suspected terrorists, he cannot suspend the set of basic constitutional principles that transcend individual constitutional texts.²²⁷ The Geneva Conventions of 1949 provide several minimum procedural safeguards for trial and defense of those accused of breaching the laws of war.²²⁸

²²³ See *supra* notes 140–44 and accompanying text.

²²⁴ Committee on Military Affairs, *supra* note 1, at 12. According to the Administration, therefore, the November 13 Order may apply to any alien connected with international terrorism generally, even if that person has no relationship with Afghanistan. *Id.*

²²⁵ November 13 Order, *supra* note 4, § 2, at 57,834; *supra* notes 144–46 and accompanying text.

²²⁶ Mike Allen & Susan Schmidt, WASH. POST, Nov. 30, 2001, at A28 (quoting President George W. Bush, Address to Federal Prosecutors on Secret Military Trials (Nov. 29, 2001)). President Bush’s words were also grounded in action; two months previous to his address to Federal Prosecutors, President Bush issued an Executive Order establishing the Office of Homeland Security and the Homeland Security Council to actively work to prevent future acts of terror on U.S. soil. See Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001).

²²⁷ JOHN E. FINN, CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW 7, 15, 18, 19, 26 (1991).

²²⁸ Murphy, *supra* note 220, at 31. Trial must be “proper” as defined by Article 105 and by the safeguards afforded Prisoners of War under the Third Geneva Convention of 1949. *Id.* at 28, 30; Marmoa et al., *supra* note 6, at 51. The only belligerents, otherwise known as combatants, who are not guaranteed the right to prisoner of war status are saboteurs or unlawful belligerents. *Id.* at 53. The Bush Administration has declared the terrorists connected to the September 11 attacks to be unlawful combatants or belligerents. See Elisabeth Bumiller & Steven Lee Myers, *Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES, Nov. 15, 2001, at B6 (quoting Vice President Cheney’s statement that “somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans—men, women and children—is not a lawful combatant”). However, prosecuting countries are still not permitted to deny belligerents and

The Conventions do not distinguish between citizens, aliens, civilians, or military.²²⁹ Rather, the Conventions state that *every person*—including civilian,

saboteurs their fundamental due process rights under the 1949 Geneva Conventions. Marmoa et al., *supra* note 6, at 54. The Conventions of 1949 apply to seven grave breaches of the laws of war:

- (1) [W]illful killing, torture or inhuman treatment, including biological experiments;
- (2) [W]illfully causing great suffering or serious injury to body or health;
- (3) [E]xtensive destruction and appropriation of property, not just by military necessity and carried out unlawfully and wantonly;
- (4) [C]ompelling a prisoner of war (Third Convention) or a protected person (Fourth Convention) to serve in the forces of the hostile power;
- (5) [W]illfully depriving a prisoner of war (Third Convention) or a protected person (Fourth Convention) of the rights of fair and regular trial prescribed in the Convention;
- (6) [U]nlawful deportation or transfer or unlawful confinement of a protected person; and
- (7) [T]aking hostages.

Murphy, *supra* note 220, at 32 (emphasis added). The 1977 Protocol I, covering civilians, articulated six additional grave breaches that the 1949 Conventions apply to:

- (1) [M]aking the civilian population or individual civilians the object of attack;
- (2) [L]aunching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- (3) [L]aunching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- (4) [M]aking non-defended localities and demilitarized zones the object of attack;
- (5) [M]aking persons the object of attack in the knowledge that he is *hors de combat*; and
- (6) [T]he perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or Protocol I.

Id. at 58–59. Additionally, superiors are liable for the breaches of their subordinates if superiors should have known that subordinates would commit wrongful acts, yet superiors do nothing to stop their subordinates. *Id.* at 61–62. Consequently, even though Osama bin Laden did not himself physically attack the United States on September 11, he would be responsible for his subordinates' actions under the Geneva Conventions.

Any terrorist associated with the September 11 attacks or with bin Laden's Afghanistan-based al Qaeda terrorist organization who has committed one of the above acts is in violation of the laws of war. Yet if the United States does not provide persons subject to the November 13 Order with minimum safeguards under the Conventions, the United States will also violate the laws of war. *Id.* at 32 (noting that it is a violation of the laws of war to willfully deprive a prisoner of war or a protected person the right of fair and regular trial as prescribed by the Conventions).

²²⁹ Murphy, *supra* note 220, at 20–22. Major Murphy notes that the drafters of the 1949 Geneva Conventions were influenced by the theory of fundamental rights. Major Murphy explains the theory thus:

[The] modern conception of the role of humanitarian law recognized that a state does not

belligerent, and unlawful belligerent, whether citizen or alien—has certain fundamental rights that can never be infringed.²³⁰ Most importantly, the Geneva Conventions require the prosecuting state to provide the defendants the same procedural rights as that state provides its own military members.²³¹ For example, defendants have the same rights to appeal as members of the prosecuting state's armed forces and to be informed of their rights.²³² Additionally, accused persons must serve their sentences under the same conditions as members of the prosecuting state's armed forces.²³³ The Geneva Conventions also state that defendants have the right to public trial, choice of counsel, and independent judges.²³⁴ Additionally, the rules of the Geneva Conventions establish that there must be a sunset provision for when the Conventions no longer apply to a particular conflict.²³⁵ The United States must provide the fundamental freedoms

proclaim principles regarding the protections due to wounded, sick and shipwrecked combatants, prisoners of war, and civilians in time of armed conflict solely in the hope of protecting its own nationals and of promoting its own interests. Rather, it does so in recognition of the basic respect that is due to the human person as such.

Id. at 20.

²³⁰ *Id.* at 10, 20; Marmoa et al., *supra* note 6, at 45–46. The fundamental rights of proper trial and defense must meet the minimum safeguards provided for by Article 105 of the General Conventions and the requirements for treatment of Prisoners of War of August 12, 1949. Murphy, *supra* note 220, at 28 (citing Geneva Conventions of 1949, specifically common articles 49, 50, 129, 146). The 1949 Geneva Civilians Convention establishes fundamental rights for persons interned as enemy civilians. *Id.*

The general rule under the Conventions is that a state is not to create special tribunals to prosecute persons of enemy nationality who are accused of committing even grave breaches of the convention. *Id.* at 29. Violators of the Conventions must be prosecuted in national criminal court systems, those either of the capturing party or of the captured. *Id.* The requirement that parties prosecute violators in national courts does not, however, seem to eliminate the validity of military commissions under the 1949 Geneva Conventions. First, the Conventions state that the purpose behind requiring trial in national courts is to ensure that trials of violators are uniform. *Id.* at 29. The Geneva Conventions seem to discuss “national courts” as distinct from “international courts,” rather than national as distinct from military. *See id.* at 31–32. Military commissions, such as the commissions provided for in the November 13 Order, can be national courts. Also, if persons subject to military commissions are given the same essential rights as persons subject to federal courts, uniformity is achieved. More importantly, military commissions are recognized means under international law of trying violations of the laws of war. Marmoa et al., *supra* note 6, at 8–12; *see also id.* at 49 (discussing the effect of the 1949 Geneva Conventions on the jurisdiction of military commissions).

²³¹ Murphy, *supra* note 220, at 30–31.

²³² *Id.* at 31 (citing Article 106 of the Third Geneva Convention).

²³³ *Id.* (citing Article 108 of the Third Geneva Convention).

²³⁴ Committee on Military Affairs, *supra* note 1, at 31.

²³⁵ Murphy, *supra* note 220, at 53–54. The Conventions do not apply “on the general close of military operations.” *Id.* It is often difficult to determine when military operations end, especially when an armed conflict involves several or a large number of states and military

articulated in the 1949 Geneva Conventions to any defendant, whether in a civil court or a military commission.²³⁶

On its face, President Bush's military commissions do not safeguard the fundamental freedoms required in the 1949 Geneva Conventions. Aliens subject to the November 13 Order, as written, are not afforded all the judicial safeguards that the government affords to United States military personnel.²³⁷ The Secretary of Defense's March Regulations do comply with many, but not all, of the courts-martial requirements.²³⁸ This note argues, however, that the November 13 Order itself, without the gloss of regulations that may be changed by subsequent Administrations, must comply with the courts-martial requirements to satisfy the 1949 Geneva Conventions requirement of equal treatment with U.S. military personnel.²³⁹

B. *Following International Law is Good Policy*

The Bush Administration has recognized that a world coalition is necessary to win the war on terrorism.²⁴⁰ It is good policy, therefore, to fight the war on terrorism in a way that encourages international cooperation.²⁴¹ Evidence has already emerged showing that countries will not extradite terrorists to the United

operations close at different times for each. *Id.*

²³⁶ Military Commissions, *supra* note 6, at 76.

²³⁷ *Id.* at 77. The November 13 Order as written does not provide the essential due process rights required under the courts-martial procedure of the UCMJ. *See supra* Part IV.B. Some experts on military commissions have argued that if military commissions must comply with courts-martial law, the United States should simply try violators of the laws of war in courts-martial, thereby ensuring dignity of the tribunal. Military Commissions, *supra* note 6, at 80.

²³⁸ *See supra* notes 159, 182 and accompanying text.

²³⁹ *Infra* notes 248–51 and accompanying text.

²⁴⁰ President George W. Bush & General Tommy Franks, Remarks in Press Availability with the Press Travel Pool, at <http://www.whitehouse.gov/news/releases/2001/12/20011228-1.html> (Dec. 28, 2001).

Attorney General Ashcroft has specifically stated:

[T]his is a fight, not only in Afghanistan and not only in the United States . . . [;] it's a fight internationally. And we're pleased with the Spanish cooperation and the German cooperation, the English cooperation. Cooperating nations all around the world. We would hope that these linkages . . . might be able to provide us with additional information that will be valuable to us in continuing effort against terrorism internationally.

Interview by Tom Brokaw with John Ashcroft, Attorney General of the United States, *NBC Nightly News* (NBC television broadcast, Nov. 19, 2001).

²⁴¹ *See* Committee on Military Affairs, *supra* note 1, at 32; *see also* Statement of Senator Patrick Leahy, *supra* note 161 (warning that even if the November 13 Order is constitutional, "[u]ltimately, the question is not only whether our government has the right or the power to take certain actions in certain ways, but whether the means we choose truly protect our security").

States unless the Bush Administration guarantees that the extradited person will not be subject to the death penalty or military commissions.²⁴² Commentators have proclaimed that the United States became the victim of terrorist attacks on September 11 because of mistakes the country had made in its international policies.²⁴³ Rather than heal the wounds caused by such mistakes, President Bush's November 13 Order may further alienate the countries of the world in at least three ways.

First, the November 13 Order declares that the commissions have extrajudicial jurisdiction²⁴⁴ in that the Order prevents the courts of any other nation or any international courts from exercising jurisdiction over persons subject to military commissions.²⁴⁵ The world community vigorously opposes the United States courts' tendency to exercise extra-judicial jurisdiction.²⁴⁶ By asserting extra-judicial jurisdiction, the November 13 Order will likely aggravate,

²⁴² Committee on Military Affairs, *supra* note 1, at 32, 39. Spain, which is holding important members of al Qaeda involved in the September 11 attacks, has stated that it will not extradite anyone to the United States without assurance that the United States will try persons it extradites in regular courts and without the death penalty. See Elisabeth Bumiller, *Spain to Study U.S. Requests to Extradite Terror Suspects*, N.Y. TIMES, Nov. 29, 2001, at B4; Sam Dillon & Donald G. McNeil, Jr., *Spain Sets Hurdle for Extraditions*, N.Y. TIMES, Nov. 24, 2001, at A1.

²⁴³ See, e.g., Dr. Ebrahim Yazdi, *Terrorism, International Law, & Islam*, Lecture at The Ohio State University Moritz College of Law (Nov. 13, 2001). Dr. Yazdi, General Secretary of the Freedom Movement of Iran and former Foreign Minister of Iran during the time of the U.S. embassy hostage crisis in Iran, noted that bin Laden and al Qaeda hate the United States because the United States helped bring to power oppressive governments in the Middle East in an attempt to destroy communism. Bin Laden has specifically listed three events as the foundations of his hatred: the United States' storming of the Arabian Peninsula during World War II; the United States' role in the establishment of a brutal government in Iran; and the United States' support of Israel's occupation of Palestinian land. *Id.*

²⁴⁴ At the same time, the Order weakens the validity of civil trials in the eyes of the world. Article 18 of the UCMJ provides that "general courts-martial also have jurisdiction to try any person who by the law is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." 10 U.S.C. § 818 (2000). If the United States does not put trust in its civil system, why should foreign citizens and states?

²⁴⁵ See November 13 Order, *supra* note 4, § 7(b)(1), at 57,835.

²⁴⁶ See Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 176 (2001) (noting that some states consider transient and general doing-business forms of U.S. jurisdiction "exorbitant"). But see *id.* at 195-97 (noting that extraterritorial jurisdiction is common in the criminal, as opposed to civil context). The U.S. government does not have the power to control foreign states' courts unless the United States and the foreign state have agreed to such jurisdiction in a treaty. No such treaty that governs jurisdiction yet exists, and discussions at conventions on the proposed Hague Convention on the Settlement of Disputes indicate that no treaty is likely to exist given that the majority of the world's states oppose extra-judicial jurisdiction. *Id.*

not ameliorate, foreign states.

Second, because the November 13 Order only applies to non-citizens,²⁴⁷ the Bush Administration declares that U.S. citizens deserve rights but that citizens of other states do not.²⁴⁸ The November 13 Order therefore sends the message to the world that the United States sees citizens of foreign states as second class.²⁴⁹ At the same time, the Administration sends the message that other countries are legally permitted to subject U.S. citizens to secret military trials like those provided for under the November 13 Order.²⁵⁰

Finally, the November 13 Order sends the message to the world that the United States is a hypocrite.²⁵¹ The United States has strongly criticized foreign

²⁴⁷ November 13 Order, *supra* note 4, § 2(a), at 57,834. The “non-citizen only” provision of the November 13 Order may, in the future, encompass even more persons than it does today. Federal and state legislatures have discussed denying citizenship to illegal immigrants’ children born in the United States. See generally Robert J. Shulman, Comment, *Children of a Lesser God: Should the Fourteenth Amendment be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669 (1995).

There is evidence, however, that the Bush Administration will subject citizens to the military commissions promulgated under the November 13 Order. See Richard Willing, *Fight to Clear Mudd’s Name May Affect Terror War*, USA TODAY, Aug. 23, 2002, at 4A (noting that the federal government argues that it may subject the two U.S. citizens with alleged Taliban or al Qaeda connections it is holding as enemy combatants, Jose Padilla and Yaser Esam Hamdi, to military commissions under the precedent of *Ex parte Quirin*); see also News Release, Cato Institute, Military Tribunal for Al Mujahir Problematic, Scholar Says, at <http://www.cato.org/new/06-02/06-10-02r.html> (June 10, 2002) (noting that the U.S. government announced that it would treat Abdullah Al Mujahir, a U.S. citizen, as an enemy combatant for plotting to build and detonate a radiological bomb). The Bush Administration cites *Ex parte Quirin* as precedent for subjecting U.S. citizens to military commissions. *Id.* Importantly, however, President Roosevelt’s commission was, unlike President Bush’s November 13 Order, limited to enemy combatants, not to non-citizens. See *supra* notes 51, 55, 56 and accompanying text.

²⁴⁸ The United States is unwise to call for international help at the same time it declares international citizens inferior. See Committee on Military Affairs, *supra* note 1, at 35; see also *supra* note 158 (discussing that the Supreme Court has repeatedly recognized that all persons, citizen or alien, civilian or military, deserve equal protection under the Constitution and the law of war).

²⁴⁹ Committee on Military Affairs, *supra* note 1, at 35.

²⁵⁰ Human Rights Watch, *Fact Sheet: Past U.S. Criticism of Military Tribunals*, HUMAN RIGHTS NEWS, at <http://www.hrw.org/press/2001/11/tribunals1128.htm> (Nov. 28, 2001) (noting that “the text of the Order may become a model for governments seeking a legal cloak for political repression”); cf. 147 CONG. REC. S9859 (daily ed. Sept. 26, 2001) (statement of Sen. Dodd in the context of a discussion about the International Criminal Court that the United States alienates the international community and that it must act with the international community in mind if it wishes to gain international cooperation in trying terrorists).

²⁵¹ Human Rights Watch, *supra* note 250. See Committee on Military Affairs, *supra* note 1, at 32. The Human Rights Watch has noted:

The United States has repeatedly argued that people accused of war crimes deserve

states for not affording U.S. citizens abroad minimal judicial rights.²⁵² The United States has explicitly condemned military commissions similar to those that the November 13 Order provides for when U.S. citizens were the defendants.²⁵³ Additionally, the United States has stated that it will not ratify the Rome Treaty, which establishes the International Criminal Court,²⁵⁴ because the treaty does not meet U.S. constitutional due process requirements.²⁵⁵

When interpreting whether the November 13 Order complies with international law, the President, Congress, and the Court should evaluate the Order as written, rather than the Order as limited by regulation.²⁵⁶ Even if the

full due process protection, including alleged war criminals in Bosnia and Rwanda. "How can the United States credibly make that argument when others are victims if it refuses to act that way itself when Americans are the victims?"

Human Rights Watch, *U.S.: New Military Commissions Threatens Rights, Credibility*, HUMAN RIGHTS NEWS, at <http://www.hrw.org/press/2001/11/miltribs1115.htm> (Nov. 15, 2001) (quoting Kenneth Roth, Executive Director of Human Rights Watch).

²⁵² Human Rights Watch, *supra* note 250. Recent examples of the United States' criticism include a Russian "secret trial for espionage," a Nigerian special military court order of execution, and a Peruvian "hooded military court" conviction of terrorism. *Id.*

²⁵³ *Id.* (discussing the United States' recent criticism of eleven countries for using military tribunals that did not afford due process protections to try civilians). Examples of due process protections that the United States sees as essential, even in trials involving national security, include the right to a public trial; the right to an impartial trial (the United States stated that foreign authorities were not impartial); the right to a presumption of innocence; and the right to appeal. *Id.* (referring to critiques of Burma, China, and Sudan).

²⁵⁴ Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9* (1998), <http://www.un.org/law/icc/statute/rome.htm>.

²⁵⁵ See, e.g., 147 CONG. REC. S9854 (daily ed. Sept. 26, 2001) (statement of Sen. Helms) (noting that the United States does not support the ICC because it threatens to deny Americans abroad due process, particularly military service members). But see 147 CONG. REC. S9859 (daily ed. Sept. 26, 2001) (statement of Sen. Dodd) (noting that during the war on terrorism the United States must support the International Criminal Court more than ever or risk endangering its military service members abroad).

Some scholars have pointed out that an international criminal court would be the ideal place to try terrorists such as bin Laden, especially when such terrorists are in the custody of countries that refuse to extradite defendants to the United States due to objections of capital punishment or military commissions. Committee on Military Affairs, *supra* note 1, at 39. The International Criminal Court (ICC) would not have jurisdiction over persons for the September 11 attacks, however, because the court only has jurisdiction over crimes committed after the Court comes into force. See Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, N.Y. TIMES, July 1, 2002, at A3 ("The court's Jurisdiction will only apply to possible crimes committed on or after Monday, July 1, 2002."). The United States has vehemently opposed the establishment of the ICC; nevertheless, the ICC has obtained the required 60 ratifications necessary to come into force on July 1, 2002. See the United Nation's International Criminal Court Internet site at <http://www.un.org/law/icc/index.html> (last visited Oct. 22, 2002).

²⁵⁶ Committee on Military Affairs, *supra* note 1, at 6.

current Administration intends to limit the scope of the November 13 Order, a future Administration could revise any limiting regulations that the Bush Administration creates.²⁵⁷ Additionally, if the Supreme Court upholds the November 13 Order as written, or if Congress does not enact legislation to limit the scope of the Order, a future President could use the November 13 Order as precedent for acting within the full scope of the Order as written.²⁵⁸ This note therefore recommends either that the President amend his November 13 Order or that Congress pass a law requiring that military commissions comply with international law.

VI. CONCLUSION

As the United States government and its people react to terrorism, the country must keep in mind the long-term goals of peace and prosperity.²⁵⁹ The United States owes it to the individuals who died in the September 11 attacks, as well as to the soldiers who have lost their lives fighting in Afghanistan since September 11, to do everything within its power to win the war on terrorism. A war commission that violates international law will hinder the United States in its global war on terrorism. If the United States violates international law, it will alienate foreign states and lose the protections of those international laws.

Trying terrorists under a military commission is not inherently problematic as long as it meets international law requirements.²⁶⁰ To meet the international and constitutional law requirements, President Bush must amend the November 13 Order to limit, or Congress must enact legislation that limits, the jurisdiction of the military commissions to persons connected with the September 11 attacks, al Qaeda, or Afghanistan. Additionally, the President must amend the November 13 Order to comply, or Congress must require that the procedure of military commissions comply, with the minimal courts-martial procedure required under the UCMJ.

Support of the international community is necessary for success in the war on terrorism, and the international community will not support the United States so

²⁵⁷ *Id.* ("Indeed, if the powers asserted by the President in the Order were upheld, this President or a future President could use the Order as precedent to exercise those powers in a different context and without the gloss now presented by his representatives.")

²⁵⁸ Committee on Military Affairs, *supra* note 1, at 6.

²⁵⁹ Yazdi, *supra* note 243.

²⁶⁰ If the President will not amend the November 13 Order, which does seem likely due to his constant statements in defense of the Order as written, then Congress should expressly limit the Order. There are currently bills in Congress, one in the House and one in the Senate, that propose limitations on military commissions that purport to meet international law requirements. See H.R. 3468, 107th Cong. (2001); S. 1937, 107th Cong. (2002); 148 CONG. REC. S733 (daily ed. Feb. 13, 2002) (statements on S. 1937, a bill to set forth requirements for trials and sentencing by military commissions).

long as the November 13 Order, which violates international law, is left unchanged.²⁶¹ President Bush has said “[t]he world will see that when we put a coalition together that says, ‘join us,’ I mean it . . . [a]nd in order to lead the coalition, we must show that we will complete the mission.”²⁶² If President Bush really “means it,” he will take seriously the requirements of international law and the concerns the rest of the world has with his military commissions.

²⁶¹ The United States must comply in general with international law to guarantee the support of the international community, and the laws of war are not the only international law that the United States must follow. *See* Sanger, *supra* note 191 (noting that foreign states have criticized the United States for violating international law by not notifying foreign states when their citizens are detained).

²⁶² President George W. Bush & General Tommy Franks, *supra* note 240.

